IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This appeal is taken from the final order of the Supreme Court of Alabama entered on November 20, 1977, quashing Appellant's petition for Writ of Certiorari to the Court of Civil Appeals of Alabama. Appellant submits this statement in support of the jurisdiction of the Supreme Court of the United States to hear this appeal and to show that a substantial federal question is presented in this appeal.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Orr v. Orr*, ___ Ala. ___, 351 So.2d 906 (1977). The opinion of the Court of Civil Appeals of Alabama is reported as *Orr v. Orr*, ___ Ala. App. ___, 351 So.2d 904 (1977). The Circuit Court of Lee County, Alabama, did not issue an opinion. A copy of each opinion is attached as Appendix A, and a copy of the judgment of the Circuit Court of Lee County, Alabama, is attached as a portion of Appendix B.

JURISDICTION

This appeal is taken by Appellant in an effort to have certain Alabama statutes which authorize a court to award alimony to women but not to men declared unconstitutional. Appellant is appealing to this Court from an order of the Supreme Court of Alabama entered on November 10, 1977, quashing its Writ of Certiorari to the Court of Civil Appeals of Alabama as improvidently granted and denying Appellant's petition for the writ. (Appendix B., p. 14a). By this order, the Supreme Court of Alabama made final the judgment of the Court of Civil Appeals (Appendix B, p. 15a) which upheld the validity of the alimony statutes in the face of Appellant's constitutional challenge. Appellant did not file a motion for rehearing in the Supreme Court of Alabama because such a motion will not be received by that Court when the subject of the motion is an order denying certiorari, Alabama Rule of Appellate Procedure 39(j).

On January 30, 1977, Counsel for Appellant filed a "Notice of Appeal to the Supreme Court of the United States" in the Supreme Court of Alabama and in the Court of Civil Appeals of Alabama (Appendix C), mailed the same to Counsel for Appellee, and mailed

the same to this Court along with his "Appearance and Notification Form".

This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). Cases which sustain this jurisdiction include: *Stanton v. Stanton*, 421 U. S. 7 (1975); *Stanley v. Illinois*, 405 U. S. 645 (1972); *Reed v. Reed*, 404 U. S. 71 (1971); and *Levy v. Louisiana*, 391 U. S. 68 (1968).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, §1, providing in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Alabama Code 1975 §§30-2-51 through 53.[1]

§30-2-51

> "If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family."

§30-2-52

> "If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the

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[1] Formerly *Code of Alabama*, Title 34, §§31-33 (1940). Upon recodification these sections underwent certain minor, technical changes. These changes have no bearing on the issues presented by this appeal and the order of the Supreme Court of Alabama was entered after recodification.

wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case."

§30-2-53

"If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife."

QUESTION PRESENTED

The ultimate question presented is whether Alabama's alimony statutes are unconstitutional. By the statutes' terms, only a man can be required to pay alimony, and this distinction between men and women gives rise to Appellant's question. Specifically: Do these statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by virtue of their absolute reliance on a gender-based classification?

STATEMENT OF THE CASE INCLUDING THE RAISING OF AND RULING UPON THE FEDERAL QUESTION

This proceeding began in the Circuit Court of Lee County, Alabama, as a contempt action against Appellant based on his failure to pay alimony as required under the terms of a divorce decree entered by that same court on July 26, 1974. In the contempt proceedings, Appellant properly raised the constitutionality of Alabama's alimony statutes by a motion of August 19, 1976, (Appendix D, p. 23a) requesting that the alimony statutes be declared

to be in violation of the Equal Protection Clause and that the alimony provision of his divorce decree be declared null and void. On that same day, the Circuit Court of Lee County, Alabama, denied Appellant's motion (Appendix D, p. 22a) and entered its judgment enforcing his alimony obligation (Appendix B, p. 16a).

Appellant appealed this order and judgment to the Court of Civil Appeals of Alabama, which noted that Appellant had "by appropriate motion filed with the trial court, challenged the constitutionality of . . . Alabama's alimony statutes," and stated that it considered the "sole issue" before it to be "whether Alabama's alimony statutes are unconstitutional." ___Ala. App. at ___, 351 So.2d at 905. (Appendix A, pp. 10a, 11a). In her brief, Appellee also agreed "that the issue before this Court [of Civil Appeals] is whether the Alabama alimony laws are unconstitutional because of the gender based classification made in the statutes." (Brief for Appellee in the Court of Civil Appeals at 1, Appendix D, p. 25a). The Court of Civil Appeals affirmed the Circuit Court's decision and upheld the constitutionality of the challenged statutes in its judgment of March 16, 1977, (Appendix B, p. 15a) and Appellant petitioned the Supreme Court of Alabama for Writ of Certiorari to the Court of Civil Appeals to review that judgment. This petition was originally granted, but in its order (Appendix B, p. 14a) and opinion (Appendix A, p. 1a) of November 10, 1977, the Supreme Court of Alabama quashed its writ as improvidently granted.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This Court has never ruled upon the validity of a state statute which authorizes alimony payments to women only. The issue was presented in *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied* 421 U.S. 929 (1975), where a divorced husband challenged the constitutionality of Georgia's alimony statutes, but the presentment to this Court was presumably in a confused posture since review was sought through Writ of Certiorari rather than by an appeal of the Georgia Supreme Court's decision upholding the validity of the statutes in the face of a constitutional challenge. *Murphy* aside, this Court has heard and resolved appeals of cases involving constitutional questions relating to a state's intrusion into the family setting when that intrusion results in the allocation of the paternal burdens along sexually discriminatory lines. In *Stanley v. Illinois*, 405 U. S. 645 (1972), this Court held that the father of an illegitimate child was entitled to the same presumptions in a custody proceeding that would normally be given to a similarly situated mother. Although the majority of the Court treated the issue involved as one of due process, four Justices held that Illinois violated the Equal Protection Clause when it made assumptions regarding paternal fitness based on gender. Similarly, this Court held in *Stanton v. Stanton*, 421 U. S. 7 (1975), that a state can not allocate paternal and marital responsibilities differently with respect to children of different gender. In that case a divorced father successfully argued that Utah could not compel him to pay support with respect to his son until his son was twenty-one years old, and with respect to his daughter only until she was eighteen years old. Other gender-based discrimination cases concerning a family or marital setting heard by this Court on appeal

from a state court decision upholding a state statute in the face of an equal protection challenge include *Reed v. Reed*, 404 U. S. 71 (1971) and *Kahn v. Shevin*, 416 U. S. 351 (1974).

Though not concerned with family or marital responsibilities, *Craig v. Boren*, 97 S.Ct. 451 (1976) provides a good contrast to Appellant's case. In *Craig* this Court struck down an Oklahoma statute which prohibited men from buying beer with 3.2% alcohol content until they reach age twenty-one. Under another statute women were allowed to buy 3.2% beer at age eighteen, and this Court held that the different age requirements unjustifiably discriminated against men even though the state had a legitimate interest in regulating who could buy alcoholic beverages. Further, a plurality of the Court premised its decision with the proposition that modern case law prohibited a state from relying on casual gender categorizations and that it was "necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where sex-centered generalizations actually comported to fact." 97 S.Ct. at 458. Appellant submits that the question posed in this appeal is easily as substantial as that in *Craig*.

A review of Alabama cases shows the nature and extent of the discrimination of Alabama's alimony statutes. The Supreme Court of Alabama treats alimony as a purely statutory right. In *Sims v. Sims*, 253 Ala. 307, 45 So.2d 25 (1950), that court reversed a lower court's modification of an alimony award and discussed the nature of alimony in its opinion. "The duty to pay alimony is because of the duty of a man to support his wife. [citation omitted] A divorce without alimony cuts off the right. A divorce decree with provisions for ali-

mony creates a duty as there provided." 253 Ala. at 311, 45 So.2d at 29. In a situation similar to that of *Sims*, the same court was even more explicit: "the jurisdiction and authority . . . to make allowances to the wife 'out of the estate of the husband,' temporary and permanent, is a statutory and limited jurisdiction." *Gabbert v. Gabbert*, 217 Ala. 599, 601, 117 So. 214, 215, 16 (1928). Further, the Supreme Court of Alabama has also held that alimony can never be awarded in favor of a man. *Davis v. Davis*, 279 Ala. 643, 189 So.2d 158 (1966) was a review of a divorce decree. The court issuing the divorce had awarded the husband custody of the parties' child and use of their jointly owned home as a home for the child. The Supreme Court of Alabama characterized the award of the home to the husband as a contribution by the wife to his support and maintenance and reversed the award saying: "[i]n the absence of a statute so providing there is no authority in this state for awarding alimony against the wife in favor of the husband. [citations omitted] There is no statute in this state authorizing such an award. The statutory scheme is to provide alimony only in favor of the wife." 279 Ala. at 644, 189 So.2d at 160.

Considering Alabama's alimony statutes as essentially statutory remedies granted only to women places Appellant in much the same situation as the appellants in *Levy v. Louisiana*, 391 U.S. 68 (1968). The appellants in *Levy* were illegitimate children who had sued in Louisiana state court to recover for the wrongful death of their mother. The trial court dismissed their suit and the Supreme Court of Louisiana affirmed this dismissal construing "child" as used in the Louisiana Wrongful Death Act to mean legitimate or acknowledged child. This Court held that, as so construed, the Louisiana act was in violation of the Equal Protection Clause because similarly

situated children were not given similar causes of action under the statute. In a like manner, similarly situated parties in a divorce proceeding are never given similar treatment in Alabama since a woman will always have a right of action for an award of alimony but a man never will.

Faced with the fact the challenged statutes do not accord men the same rights as similarly situated women, the issue of this appeal is whether the discriminatory treatment is justified by important governmental objectives and is substantially related to those objectives, *Craig*, 97 S.Ct. at 457, or even whether it rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persone similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920).

Historically, the Courts of Alabama have explained the discriminatory effect of the challenged statutes by reference to the common law. "The basis for these statutes is the common-law obligation of a husband to support his wife." *Davis*, 279 Ala. at 644, 189 So.2d at 160. "The duty to pay alimony is because of the duty of a man to support his wife." *Sims*, 253 Ala. at 311, 45 So.2d at 29. Alabama can not rely on the fact that the common law placed a different burden on men and women to justify the discrimination of its statutes, however. This type of structuring the law to reflect the traditional gender role models is precisely what the Equal Protection Clause has come to prohibit. Thus, in *Craig* this Court explained its decision in *Stanton*, 421 U. S. 7, as holding "that *Reed* [404 U. S. 71] required invalidation of the Utah differential age-of-maturity statute, notwithstanding the statute's coincidence with a

furtherance of the State's purpose of fostering 'old notions' or role-typing and preparing boys for their expected performance in the economic and political worlds." 97 S.Ct. at 457. To argue that discrimination may be justified by historical and common law inequities completely ignores the role of our Constitution in correcting these inequities and securing personal rights not guaranteed by the common law. Similarly, the obviously substantial relation that the discrimination bears to the statutes' objective does not save the statutes, because that objective is neither fair nor proper but rather is to insure that similarly circumstanced persons will *not* be treated alike.

The Court of Civil Appeals of Alabama apparently realized the absurdity of a historical justification for Alabama's discriminatory alimony laws, and its opinion in this case did not mention any of the explanations of the law which are quoted above. Rather the Court of Civil Appeals merely quoted at length the discussion of *Kahn*, 416 U. S. 351, in *Murphy*, 232 Ga. 352, 206 S.E.2d 458, and concluded: "[a]s the Georgia Supreme Court stated, the reasons noted above [in the *Kahn* opinion] are equally applicable in the instance of the wife involved in seeking alimony pursuant to a divorce. It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed." ___ Ala. App. at ___, 351 So.2d at 905. (Appendix A, p. 12a). Appellant contends that these nineteenth century statutes cannot be saved by such a blithe appropriation of a "benign" purpose and refers this Court to its statement in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), in which the Court equalized Social Security benefits paid to male and female surviving spouses with children: "but the mere recitation of a benign, compensatory purpose is not an automatic

shield which protects against any inquiry into the actual purposes of the statutory scheme." 420 U.S. at 648.

In any event, the Court of Civil Appeals' reliance on *Kahn* to justify the discriminatory alimony statutes was misplaced. In *Kahn*, this Court heard an appeal from the Supreme Court of Florida in which a widower claimed that Florida's tax scheme was in violation of the Equal Protection Clause. The statute in question gave widows an annual five hundred dollar property tax exemption but did not apply to benefit widowers. Appellant Kahn was a widower who applied for this exemption and, upon its denial, took his case to court. This Court upheld the Florida statute after noting the wide latitude given a state in formulating its tax policy and considering the statute in question to be "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." 416 U. S. at 355.

The statute in *Kahn* merely granted a gratuitous benefit to widows but not to widowers, but the statutes in question in this appeal intrude into the marital relationship and arbitrarily allocate the benefits and burdens incumbent upon a divorce according to the gender of the parties. If Alabama is truly interested in aiding "the wife of a broken marriage who need financial assistance," then *Kahn* would presumably justify a tax credit given to divorced women, but that case does not justify the state's discriminatory alimony statutes which aid the wife of a broken marriage at the expense of her often innocent husband. If " 'archaic and overbroad' generalications . . . could not justify the use of gender line in determining eligibility for certain government entitlements," *Craig*, 97 S. Ct. at 457, then certainly they can not justify Alabama's use of gender line in allocating

family responsibilities. Further, the over-inclusiveness of the classification of "widows" in the Florida statute saved the state the cost of maintaining administrative proceedings to determine which widows were actually needy. Alabama, however, realizes no administrative economy by denying alimony benefits to men. Since a hearing is presently held to determine if alimony is due to a women and, if so, what amount is due her, allowing her spouse to state his claim to alimony would not overburden Alabama's administration of divorce.

The confusion of the Court of Civil Appeals is further exhibited by its reference to *Whitt v. Vauthier,* 316 So.2d 202 (La. App. 4th Cir. 1975), *Writ refused* October 17, 1975, and its statement that *Whitt* is in accord with its decision. *Whitt* was a challenge to a Louisiana statute which authorized alimony for women only. While the Louisiana court admittedly relied on *Kahn* to uphold the statute, it also pointed out that men were entitled to an award of alimony under the applicable principles of civilian law. "Not only do we reject the assumption that divorced husbands do not have a similar remedy, but we find no basis to declare Art. 160 unconstitutional." 316 So.2d 205, 206. Recognizing that the Louisiana alimony statute could have been saved by the fact that an alternative remedy was open to men, *Whitt* obviously does not support the constitutionality of a similar statute in a jurisdiction which has specifically refused to award men a similar common law cause of action.

Throughout their proceedings, the courts of Alabama considered the sole issue of this case to be the constitutionality of Alabama's alimony statutes and doggedly upheld these statutes. Consequently, this Court is presented with an issue of national interest and public concern in the clearest terms possible. That the constitutionality of these statutes is an issue of national concern cannot be disputed. By last count, over one-fifth of our states have alimony statutes which operate to discriminate against men, *Thaler v. Thaler,* 89 Misc. 2d 315, ___, 391 N. Y. S. 2d 331, 338 (Sup. Ct. 1977), so the issue is neither foreclosed by a national consensus nor limited to the particular circumstances of this case. Rather, the number of states with discriminatory alimony statutes and the recent challenges of these statutes indicate that the constitutionality of these statutes is a "live" issue and in need of resolution by this Court. Statements have been made that the Court should avoid dealing with issues such as this until after the states have finally acted upon the Equal Rights Amendment, but this appeal should not be dismissed in an effort to postpone the resolution of the question it presents. Apart from considerations of whether the Court can legitimately avoid hearing an appeal from a state court which properly presents a substantial federal question, Appellant's equal protection claim and the principles upon which it is founded are distinct from the success or failure of the Amendment's proponents. Further, the present confusion over the Amendment's ratification and the conflicting appraisals of whether the Amendment is actually necessary to secure equal rights between men and women compel this Court to hear and resolve this case as a squarely presented opportunity to clarify the state of the law as it exists today. Finally, Appellant's present alimony obligation in excess of fifteen hundred dollars per month lends an immediate substantiality to this case, especially when compared to those cases where appellants claimed a five hundred dollar per year tax exemption, *Kahn,* 416 U. S. 351, or a right to indiscriminately buy and sell 3.2% beer, *Craig,* 97 S. Ct. 451.

CONCLUSION

The question presented in this appeal is substantial and of public importance and therefore requires plenary consideration, with brief on the merits and oral arguments, for its resolution.

Respectfully submitted,

JOHN L. CAPELL, III

CLINTON B. SMITH

APPENDIX

APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1977-78

S.C. 2536 Ex parte: William Herbert Orr

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: William Herbert Orr
v.
Lillian M. Orr)

PER CURIAM.

PETITION FOR WRIT OF CERTIORARI QUASHED AS IMPROVIDENTLY GRANTED.

Maddox, Faulkner, Shores, Embry, and Beatty, JJ., concur

Almon, J., concurs specially, with whom Bloodwroth, J., joins.

Jones, J., dissents.

Torbert, C. J., recuses.

ALMON, JUSTICE (concurring specially):

I concur in affirming the Court of Civil Appeals and continue to adhere to the views expressed in my dissent in *Peddy v. Montgomery,* 345 So.2d 631, 637 (Ala., 1977).

I dissented from the Court's opinion in *Peddy* because I felt it established a precedent which would lead to striking down every state statute making a gender related classification. At the forefront of my fears were challenges to the laws concerning marital rights; such as, home-

stead, dower, and alimony. These laws are designed to foster and preserve the family unit, a constitutionally permissible area for legislation.

The breadth of the pen with which the Court wrote *Peddy* has now come back to confront us. It appears that when viewed in isolation, statutes which restrict the rights of women are unconstitutional. On the other hand, statutes which grant to women rights which men do not possess are not unconstitutional.

Bloodworth, J., concurs.

JONES, JUSTICE (Dissenting):

I respectfully dissent.

This case, before the Court upon writ of certiorari, concerns the constitutionality of Alabama's alimony statutes. See Tit. 34, § § 31-33, Code. William Herbert Orr, Petitioner, contends that these statutes are unconstitutional in that they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because a wife may obtain alimony, whereas a husband, under similar circumstances, may not. The Petitioner also asserts that these statutes violate the Due Process Clause of the Fifth Amendment. Because this argument is so interwoven into the fabric of the equal protection contentions, the two will be dealt with together. Based upon *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. den. 421 U.S. 929 (1975), the trial Court and Court of Civil Appeals held our statute constitutionally acceptable. I would reverse.

The facts of this case are not in dispute. On February 27, 1974, Mr. Orr and Lillian M. Orr, Respondent, signed a written stipulation wherein Mr. Orr agreed to pay Mrs. Orr the sum of $1,240 per month for her

support and maintenance. On that same date, a final decree of divorce, incorporating the above agreement, was granted.

On July 28, 1976, Mrs. Orr alleged that Mr. Orr was $2,848 in arrears in his alimony payments. Mr. Orr filed a motion alleging that Mrs. Orr's petition was based upon an illegal decree in that it relied upon Tit. 34, § § 31-33, Code, and that these sections are unconstitutional. The trial Court denied the motion and granted judgment against Mr. Orr for the arrearages, attorney's fees, and court costs.

Here, we have a needy wife who qualifies for alimony and a husband who has the property and earnings from which alimony can be paid. The veracity of this statement has not been contested. The husband, however, complains that the statutes are unconstitutional because they place an obligation upon male spouses which is not reciprocally impressed upon female spouses. The husband who must pay this alimony has sufficient standing to raise the constitutional questions involved. See *Stern v. Stern*, 165 Conn. 190, 332 A.2d 78 (1973).

Tit. 34, § 31, Code of Alabama, provides:

> If the wife has no separate estate, or if it be insufficient for her maintenance, the judge, upon granting a divorce at his discretion may decree to *the wife* an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family. (Emphasis added.)

This Court has held that the statutory scheme is to provide alimony only in favor of the wife. *Davis v. Davis*, 278 Ala. 643, 189 So.2d 158 (1966). It is this inequality of treatment which the Petitioner alleges is unconstitutional.

Two standards are utilized to determine whether a statute will withstand examination under the Equal Protection Clause of the United States Constitution. The strict scrutiny standard is a test reserved for cases involving laws which operate to the disadvantage of suspect classifications or that interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973). Under the second, and traditional, equal protection analysis, a legislative classification must be sustained unless it is patently arbitrary and bears no reasonable, rational relationship to a proper governmental interest. *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Jefferson v. Hackney,* 406 U.S. 535 (1972); and *Richardson v. Belcher,* 404 U.S. 78 (1971).

"General equality" is one of the fundamental rights guaranteed each citizen. *Peddy v. Montgomery,* 345 So.2d 631 (Ala. 1977); and *In re Dorsey,* 7 Port. 293 (Ala. 1838). This, however, does not mean that all types of equal protection classifications are to be examined under the strict scrutiny test. Likewise, it does not mean that natural, rational classifications must be treated identically. Instead, they must be treated with "general equality."

Sex, itself, has been held to be a "suspect" classification by only a plurality of the Supreme Court. *Frontiero,* supra. As a plurality decision, it is enlightening, but not controlling. *Husband M v. Wife M,* 321 A.2d 115 (Del. (1974). Moreover, as pointed out by the dissent in *Frontiero,* it is inappropriate to hold sex suspect while the Equal Rights Amendment, which would render the decision moot, is still pending. *Frontiero,* at 691 (Powell, J., concurring). I see no reason to hold sex suspect in

this case because the discrimination evident upon the fact of the statutes fails even under the lesser "rational relationship" test.

Separating persons into various classifications does not, per se, violate the Equal Protection Clause. It is only invidious discrimination which offends the Constitution. *Ferguson v. Skrupa,* 372 U.S. 726 (1963); and *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955).

> "[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] . . . The Equal Protection of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." *Reed v. Reed,* 404 U.S. 71, 75 (1971).

When the above-stated formula is applied to the classification contained in our alimony statutes, in my opinion, these statutes must be deemed unconstitutional.

The initial inquiry concerns whether these statutes are "arbitrary." The basis of our alimony statutes lies in the common law obligation of a husband to support his wife. *Sims v. Sims,* 253 Ala. 307, 45 So.2d 25 (1950); 27A C.J.S., *Divorce,* § 228; and 15 A.L.R.2d 1246 (1951). While this discrimination may have some historical legal justification, the advent of the married woman's property acts dissolve any present justification. The wife is no longer the chattel of her spouse. She is a coequal

partner, with equal duties, rights and obligations. Therefore, any discrimination as to who may receive alimony, merely because of sex, in my opinion, must be viewed as arbitrary.

Even should we hold that the classification by sex is not arbitrary, it must bear a rational relation to some legitimate governmental purpose. Rationality, as used here, however, does not mean that some vague, sentimental, paternalistic, or chivalric reason for the rule exists; it means that there is a truly rational relationship between the means used and the purpose sought to be served. See *Thaler v. Thaler,* 391 N.Y.S.2d 331 (1977). Because, as stated, the basis of the statute rests upon the assumption that wives may depend upon their husbands for support, but husbands never so depend upon their wives, the statute must fail because such a distinction has no rational basis in reality.

Mrs. Orr asks this Court to follow the example of the Georgia Supreme Court in *Murphy v. Murphy,* supra. In that case, the Georgia alimony statute (similar to our own in that only women can receive alimony) was held constitutional. To a large extent, the case was based upon the Supreme Court case of *Kahn v. Shevin,* 416 U.S. 351 (1974). While dealing with a tax exemption for widows only, *Kahn* held that a rational relation to a legitimate interest existed because of the undisputed financial difficulties confronting the lone woman in today's society.

I cannot accept the reasoning of the Georgia Court in *Murphy* and *Shepherd v. Shepherd,* 233 Ga. 228, 210 S.E.2d 731 (1974) (reaffirming *Murphy*). The *Kahn* decision was based upon a state taxing statute. It is well recognized that such statutes are given great constitutional leeway. See *Kahn,* at 355; *Lehnhausen v. Lake*

Shore Auto Parts Co., 410 U.S. 356 (1973); and *Ginsburg, Gender and the Constitution,* 44 Cincinnati L.Rev. 1, 13 (1975). Furthermore, the reasoning of Justice Douglas is circuitous in that, given the historic economic inequality between the sexes which he cites, a holding of this type merely perpetuates these practices because of its "protective" posture. Moreover, *Kahn* was decided prior to *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), which evinces a shift in the Court's approach to sex-discrimination cases.

In *Weinberger,* the Supreme Court held that it was unconstitutional to allow a widow certain social security benefits not granted a widower. While recognizing that men are more likely than women to be the primary family "breadwinner," the Court found no rational basis for the statutory distinction between men and women. 420 U.S., at 645. Numerical probabilities evince no rational reason for the absolute exclusion of male spouses from the statute. Especially is this true where, as in the case before us, the trial Court has discretion as to whether to grant alimony at all. *Thaler v. Thaler,* at 336.

Even assuming arguendo this Court found the Alabama alimony statutes to be nonarbitrary and to have a rational relationship to the object of the legislation, I would hold the statutes unconstitutional because the object of the legislation is, itself, improper. See *Darrin v. Gould,* 540 P.2d 882 (Wash. 1975). Regardless of the presence of a rational relation, the statute must have some legitimate, constitutional interest as its objective.

The objective of the legislature, in passing these statutes, was to protect the lone female from the uncompromising realities of the business world. The presumed justification for this objective is that in the great bulk of divorces it is the woman who is economically disadvan-

taged. This, however, does not lead to a permissible conclusion that males may be denied alimony in situations where females are granted it. Given the legal inhibition against sexual discrimination, the fact that statistically a wife is much more likely to be an alimony recipient cannot mean, as a matter of law, that a husband should be excluded altogether from access to alimony.

> "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero*, at 684.

Such "protective," paternalistic legislation as we have before us should not be allowed continued effectiveness. Philosophically, a benevolent grant to women of legal rights unreasonably denied to men may help women immediately affected. This type statute, however, has the continuing effect of implicit condescension and perpetuates the misguided conception that women are not legally equal to men. *Thaler*, at 333. See *Peddy v. Montgomery*, supra; and *Ginsburg*, at 3, 6. Moreover, in *Weinberger*, the Supreme Court indicated it would no longer "accept at face value, as an automatic shield for discrimination, recitation of woman-protective purposes for laws [which effectively] associate women with the hearth and men with the wide world outside the home." *Ginsburg*, at 41. The discrimination explicit in Tit. 34, §§ 31-33, Code, should not be tolerated. The right of support depends not upon sex, but upon need.

Several Courts have read their alimony statutes so as to include males. See *Whitt v. Vauthier*, 316 So.2d 202 (La.App. 1975); and *Thaler*, supra. I cannot accept this reasoning, however. This Court has previously deter-

mined that our statute provides no alimony for male spouses. *Davis v. Davis*, supra. Furthermore, because there was no alimony at common law, our statute must be strictly construed. The power to award alimony is jealously limited to statutory authority. *Gabbert v. Gabbert*, 217 Ala. 599, 117 So. 214 (1928); and 27A C.J.S., *Divorce*, § 203. For this reason, I would hold the alimony statutes unconstitutional but I would not rewrite them so as to include the male spouse. We must look to the legislature to pass a more appropriate statute.

Moreover, as in *Peddy*, supra, "we are not called upon to decide whether all legislation which contains a so-called 'gender-based classification' violates the constitution, either of this [state or of the United States." 345 So.2d 635.] (Sic).

I conclude with one additional observation: Nothing I have said in this dissenting opinion should be construed as an accusation of inconsistency on the part of the majority in the instant case with the holding of the majority in *Peddy*. Indeed, I believe even a casual reading of this dissent will disclose that I have cited *Peddy* for an incidental point merely, and not as precedent for my views. I acknowledge that *Peddy*'s rationale is not sex based; that the statute there declared unconstitutional was obligatory—declaring the conveyance void for failure of the husband to join in its execution; and that the statute here under attack leaves the grant of alimony discretionary with the trial court upon its finding of need on the part of the wife, ability to pay on the part of the husband, etc. While this difference does not require, in my opinion, different results, neither does it compel reversal in this case. I say this simply to make clear that my views herein expressed represent an exten-

sion of *Peddy*'s rationale; and, therefore, I do not assert, as do my fellow Justices Bloodworth and Almon, inconsistency on the part of the majority.

For the reasons stated above, I would grant the writ and hold that the Court of Civil Appeals is due to be reversed.

[I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 10 day of Nov. 1977.

/s/ J. O. Sentell

Clerk, Supreme Court of Alabama]

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 1976-77

Civ. 1006

William Herbert Orr

v.

Lillian M. Orr

Appeal from Lee Circuit Court

HOLMES, JUDGE

The husband, by appropriate motion filed with the trial court, challenged the constitutionality of Tit. 34,

§ § 31-33, Code of Alabama, Alabama's alimony statutes. The trial court denied the husband's motion.

The sole issue before this court is whether Alabama's alimony statutes are unconstitutional. We find they are not unconstitutional and affirm.

The husband, through able counsel, contends that Alabama's alimony statutes are unconstitutional in that they violate the 14th Amendment to the U.S. Constitution. The husband argues that the appropriate statutes provide for an award of alimony to females without providing for a corresponding award to males and, therefore, males are denied the right to equal protection under the law.

The same issue before this court was argued before the Supreme Court of Georgia in *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975). The Georgia Supreme Court discussed the same cases and rationale raised by the husband on this appeal. After careful study and consideration, we are of the opinion that we cannot improve on the language or reasoning of the Georgia court. We therefore adopt the following language found in the Georgia case as our own:

"In Kahn v. Shevin, —— U.S. ——. 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974), the United States Supreme Court approved the constitutionality of a Florida statute which grants widows an annual property tax exemption of $500 but offers no analogous benefit for widowers . . . . [W]e believe the ratio decidendi of Kahn is dispositive of the issues presented here. See also Dill v. Dill, 231 Ga. 231, 206 S.E.2d 6; and, Husband M. v. Wife M., 321 A.2d 115, decided by the Supreme Court of Delaware, April 18, 1974.

"The United States Supreme Court determined the Florida statute involved in the Kahn case, providing different treatment of widows and widowers ' "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, [30 L.Ed.2d 231] quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989' Id., p. 1737, of 94 S.Ct. The court there went on to say: 'This is not a case like Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, where the Government denied its female employees both substantive and procedural benefits granted males "solely for administrative convenience" . . . We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionally heavy burden.'

"The court also observed in its opinion that the financial difficulties confronting the lone woman exceed those facing the man and this disparity of earnings is likely to be exacerbated for the widow. 'While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.' Id., p. 1737, of 94 S.Ct." (206 S.E. 2d at 459)

As the Georgia Supreme Court stated, the reasons noted above are equally applicable in the instance of a wife involved in seeking alimony pursuant to a divorce. It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed. Again quoting from *Murphy v. Murphy, supra:*

"As noted in footnote 10 of the majority opinion of the court in Kahn, ' "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U.S. 726, 730 [83 S.Ct. 1028, 1031, 10 L.Ed.2d 93].' " (206 S.E.2d at 459, 460)

In accord is *Whitt v. Vauthier,* La.App., 316 So.2d 202 (1975).

The trial court is due to be and is affirmed.

AFFIRMED.

Wright, P. J., and Bradley, J., concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 16th day of Mar., 1977.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

APPENDIX B

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1977-78

NOVEMBER 10, 1978

SC 2536

EX PARTE: WILLIAM HERBERT ORR

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (RE: WILLIAM HERBERT ORR V. LILLIAN M. ORR)

WHEREAS, on May 24, 1977, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure.

WHEREUPON, come the parties and the Petition for Writ of Certiorari to the Court of Civil Appeals being duly submitted and examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed, and that the petition should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Writ of Certiorari heretofore issued to the Court of Civil Appeals be, and the same is hereby, quashed, and the petition be, and the same is hereby, denied, at the costs of the petitioner, for which costs let execution issue.

OPINION PER CURIAM
MADDOX, FAULKNER, SHORES, EMBRY & BEATTY, JJ., CONCUR

ALMON, J., CONCURS SPECIALLY WITH WHOM BLOODWORTH, J., JOINS
JONES, J., DISSENTS
TORBERT, C.J., RECUSES HIMSELF

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 30 day of Jan 1978

/s/ J.O. Sentell

Clerk, Supreme Court of Alabama

THE COURT OF CIVIL APPEALS
WEDNESDAY, MARCH 16, 1977

PRESENT: ALL JUDGES

Civ. 1006	*	
William Herbert Orr	*	
v.	*	LEE CIRCUIT COURT
Lillian M. Orr	*	

This cause having been submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Circuit Court be and the same is hereby affirmed.

IT IS FURTHER ORDERED that the appellant, William Herbert Orr and sureties for the costs of appeal, pay the costs of appeal in the Court below.

Opinion by Holmes, J.
Wright, P.J. and Bradley, J., concur

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 30 day of Jan, 1978.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

LILLIAN M. ORR, *Complainant,*	)	
v.	)	CIVIL ACTION
WILLIAM HERBERT ORR,	)	NO. 186
Respondent.	)	

JUDGMENT

On July 28, 1976, the complainant, Lillian M. Orr, filed her petition for Rule to Show Cause and Judgment in this Court. By Order of this Court dated July 28, 1976, the said Petition was set for hearing on August 19, 1976 in this Court, and the respondent, William Herbert Orr, was ordered to appear in this Court on August 19, 1976, at 9:00 a.m. to show cause why he should not be adjudged in contempt of this Court for refusing to abide by its decree.

The Order granting a hearing on the Petition described above and the Petition were served on the Respondent, William Herbert Orr, by registered mail on August 2, 1976, and the return receipt showing service was filed in the office of the Clerk of the Circuit Court of Lee County, Alabama, on August 4, 1976.

On Thursday, August 19, 1976, at 9:00 a.m. Honorable John L. Capell, an attorney representing the respondent, appeared specially on behalf of the respondent in this Court, and filed a motion challenging the constitutionality of certain Alabama divorce laws and asking that the Divorce Decree in this case be declared null and void. No general appearance was made by the respondent or his attorney. The said motion was overruled and denied on this date. When the Court overruled and denied the said motion the said attorney representing the respondent left the Courtroom.

The complainant, Lillian M. Orr, appeared with her attorney, the Honorable W. F. Horsley, in this Court on Thursday, August 19, 1976, at 9:00 a.m. at which time the complainant's petition was called for hearing. No one appeared generally for the respondent, William Herbert Orr. The witnesses were duly sworn and testimony was taken ore tenus before the Court. The Court has carefully considered the testimony in this case, and makes the findings of fact described below.

The Court finds from the evidence that the parties to this case for divorce by decree of this Court dated February 26, 1974, which said decree incorporated therein a stipulation of the parties entered into between the parties on February 26, 1974, which is on file in this case. This stipulation provides that the respondent make alimony payments to the complainant in monthly

amounts of $1,656.00, said payments to be made in the amount of $828.00 per payment on the 5th and 20th of each month.

The last payment made by the respondent to the complainant was in the amount of $828.00, and was made on June 5, 1976. Respondent has not made payments to the complainant as provided by the Decree of Divorce on June 20, 1976, July 5, 1976, July 20, 1976, and August 5, 1976. The respondent is in arrears in his alimony payments in the total amount, as of this date, of $3,312.00.

The Decree of Divorce in this case further provides that respondent pay the premiums on the policy of insurance covering complainant's automobile. A premium in the amount of $212.00 has been due and payable since May 15, 1976, but has not been paid, as of this date, by the respondent.

The Court further finds from the evidence that the complainant has been required to employ attorneys in the State of Alabama and in the State of California (where respondent now resides) to enforce the Divorce Decree of this Court, and the Court finds that a reasonable attorney fee for said attorneys is in the amount of $2,000.00. The Court notes and finds that extensive work has been required of the attorneys for the complainant to enforce the Order of this Court.

IT IS ORDERED, ADJUDGED, AND DECREED by the Court as follows:

1. That the complainant, Lillian M. Orr, have and recover of the respondent, William Herbert Orr, the total sum of $5,524.00 (which sum is made up of $3,312.00 in alimony, $212.00 due for payment of the premium on an insurance policy, and $2000.00 in attorney fees).

2. Costs of Court are taxed against the respondent.

3. Execution may issue for the recovery of the judgment and costs of Court.

4. That the Clerk of this Court mail a copy of this Order, postage prepaid, to the following:

Honorable W. F. Horsley
Samford, Denson, Horsley & Pettey
Post Office Box 2345
Opelika, AL 36801

Honorable John L. Capell
Capell, Howard, Knabe & Cobbs, P.A.
Post Office Box 2069
Montgomery, AL 36103

Mr. William Herbert Orr
Orrox Corporation
3303 Scott Blvd.
Santa Clara, CA 95050

DONE this the 19th day of August, 1976.

/s/ G. H. Wright Jr.
Circuit Judge

FILED IN OFFICE THIS
Aug 19, 1976
HAL SMITH, Register
Circuit Court, In
Equity Lee County,
Alabama]

APPENDIX C

[Filed Jan 30, 1978]

IN THE COURT OF CIVIL APPEALS
OF ALABAMA

WILLIAM HERBERT ORR,	X	
Appellant	X	
-vs-	X	NO. _____
LILLIAN M. ORR	X	
Appellee	X	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Herbert Orr, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Alabama, quashing the petition for Writ of Certiorari to the Court of Civil Appeals of Alabama, entered in this action on November 10, 1977.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ John L. Capell, III
John L. Capell, III

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of January, 1978, I have served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Mr. W. F. Horsley, of Samford, Denson, Horsley & Pettey, P. O. Box 2345, Opelika, Alabama 36801, by mailing such copy by United States mail, postage prepaid and properly addressed.

I further certify that Mr. William F. Horsley is attorney for the Appellee in this matter and that by service upon him, all parties required to be served have been served.

/s/ John L. Capell, III
John L. Capell, III

APPENDIX D

LILLIAN M. ORR,	)	IN THE CIRCUIT COURT OF
Complainant,	)	LEE COUNTY, ALABAMA
VS.	)	CIVIL ACTION
WILLIAM HERBERT ORR,	)	NO. 186
Respondent.	)	

ORDER DENYING MOTION

On August 19, 1976, the respondent, William Herbert Orr, appeared specially, and filed in this Court his motion seeking a decree by this Court that *Code of Alabama,* Title 34, Sections 31-33 are unconstitutional, and further seeking an injunction against the continued enforcement of the statutes, and a judgment declaring the Divorce Decree in this case granting alimony to complainant be rendered null and void.

The Court has carefully considered said motion, and the memorandum submitted in support of the said motion, and the Court is of the opinion that this motion should be overruled and denied. It is, therefore,

ORDERED, ADJUDGED, AND DECREED by the Court that the respondent's motion, referred to above, be and the same is hereby overruled and denied.

DONE this the 19th day of August, 1976.

/s/ G. H. Wright, Jr.
Circuit Judge

NOTE TO CLERK: The Clerk is instructed to send a copy of this Order to Capell, Howard, Knabe & Cobbs, P.A., Attorneys for Respondent, at Post Office Box

2069, Montgomery, Alabama, 36103; and W. F. Horsley, Attorney for Complainant, at Post Office Box 2345, Opelika, Alabama, 36801.

/s/ G. H. Wright, Jr.
Circuit Judge

[FILED IN OFFICE THIS
Aug 19 1976
HAL SMITH, Register
Circuit Court, In Equity
Lee County, Alabama]

IN THE CIRCUIT COURT OF
LEE COUNTY, ALABAMA.

IN RE THE MARRIAGE OF	*	
LILLIAN M. ORR and	*	CASE NO. 186
WILLIAM HERBERT ORR.	*	

MOTION

Comes now specially appearing, William Herbert Orr, the Respondent in the above styled cause, and respectfully represents unto this Honorable Court as follows:

1. That this Court on, to-wit, February 26, 1974, rendered a decree of divorce forever dissolving the bonds of matrimony between the parties hereto.

2. That said decree of divorce was an illegal decree being rendered in reliance on *Code of Alabama,* Title 34, §§31-33, which grant an allowance to the wife on decree of divorce.

3. That *Code of Alabama,* Title 34, §§31-33 are unconstitutional because only a divorced husband is

obligated to pay alimony under the statutes, thereby arbitrarily discriminating against male spouses, and thus depriving the husband of due process and equal protection of the law.

WHEREFORE, your Respondent moves the Court for an order decreeing that:

1. *Code of Alabama,* Title 34, §§31-33 arbitrarily discriminate against male spouses and thus are in violation of the equal protection clause of the United States Constitution and thereby are unconstitutional.

2. A permanent injunction be issued against the continued enforcement of these statutes.

3. The decree ordering your Respondent to pay the Complainant alimony be rendered null and void.

/s/ John L. Capell
John L. Capell, Attorney for Respondent

OF COUNSEL:

Capell, Howard, Knabe & Cobbs, P.A.
Post Office Box 2069
Montgomery, Alabama 36103
(205) 262-1671

IN THE COURT OF CIVIL APPEALS
STATE OF ALABAMA

WILLIAM HERBERT ORR,	)	
Appellant,	)	
VS.	)	CIVIL COURT NO. 186
LILLIAN M. ORR,	)	
Appellee.	)	

BRIEF OF APPELLEE

Statement of Issues Presented for Review

The appellee agrees that the issue before this Court is whether the Alabama alimony laws are unconstitutional because of the gender based classification made in the statutes. The appellant, in his statement of issues presented for review, alleges that the equal protection clause of the Constitution and the due process clause of the Constitution are violated by the statutes, but he only argues the equal protection clause.

Statement of the Case

The appellee agrees with appellant's statement of the case.

Statement of the Facts

The appellee agrees with appellant's statement of the facts.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

Washington, D.C. • THIEL PRESS • (202) 638-4521

[DOCKETED FEBRUARY 8, 1978]

[PROBABLE JURISDICTION NOTED MAY 30, 1978]

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

February 26, 1974	– Divorce Decree entered by the Circuit Court of Lee County, Alabama, dissolving the marriage of William Herbert Orr and Lillian M. Orr and ordering Mr. Orr to pay alimony to Ms. Orr.
July 28, 1976	– Ms. Orr's Petition for Rule to Show Cause and for Judgment filed in the Circuit Court requesting *inter alia* that Mr. Orr be ordered to pay alimony accrued since June 5, 1976.
August 19, 1976	– Mr. Orr's Motion challenging the constitutionality of Alabama's alimony statutes filed in the Circuit Court in response to Ms. Orr's Petition.
August 19, 1976	– Order of the Circuit Court entered denying Mr. Orr's Motion.
August 19, 1976	– Judgment of the Circuit Court entered against Ms. Orr for *inter alia* $3,312.00 as accrued alimony.
September 29, 1976	– Mr. Orr's Notice of Appeal to the Court of Civil Appeals of Alabama filed in the Circuit Court.
March 2, 1977	– Appeal submitted to the Court of Civil Appeals on the briefs.
March 16, 1977	– Order and Opinion of the Court of Civil Appeals entered affirming the judgment of the Circuit Court.
April 26, 1977	– Mr. Orr's Petition for Writ of Certiorari to the Court of Civil Appeals filed in the Supreme Court of Alabama.
May 24, 1977	– Order of the Supreme Court of Alabama entered granting Mr. Orr's Petition for Writ of Certiorari.
November 10, 1977	– Order of the Supreme Court of Alabama entered quashing that Court's Writ of Certiorari as improvidently granted.

IN THE CIRCUIT COURT OF
LEE COUNTY, ALABAMA

IN RE: THE MARRIAGE OF	)	
	)	
LILLIAN M. ORR AND	)	
	)	
WILLIAM HERBERT ORR.	)	
	)	
	)	CASE NO. 186
	)	
LILLIAN M. ORR,	)	
	)	
COMPLAINANT,	)	
	)	
VS.	)	
	)	
WILLIAM HERBERT ORR,	)	
	)	
RESPONDENT.	)	

PETITION FOR RULE TO SHOW CAUSE
AND FOR JUDGMENT

Comes now Lillian M. Orr, complainant in the above styled cause, and represents and shows unto this Honorable Court as follows:

1. That this Court on, to-wit, February 26, 1974, rendered a decree of divorce forever dissolving the bonds of matrimony between the parties hereto.

2. The said decree of dicorce (a copy of which is marked Exhibit "A", attached hereto, and made a part

hereof by reference) provides, *inter alia* that the respondent will pay to the complainant $1,656.00 per month as alimony, said payments to be made in the amount of $828.00 per payment on the 5th and 20th of each month.

3. Complainant alleges that the last payment made to her by respondent was in the amount of $828.00, and was made on June 5, 1976. The payments for June 20, 1976, July 5, 1976, and July 20, 1976, have not been made by respondent as ordered by said divorce decree, and the said respondent is in arrears on said payments in the amount of $2,484.00, and the said sum of $2,484.00 is due and owing to complainant.

4. Complainant says that respondent's failure to make said payments as required by the divorce decree has been willful and contemptuous.

THE PREMISES CONSIDERED, your petitioner prays that the Court grant the following relief:

1. Respondent be ordered to pay, as alimony, all sums which he has failed and refused to pay since June 5, 1976, said amount to be calculated at the rate of $828.00 due on the 5th and 20th of each month, to the date of the hearing of this petition.

2. That respondent be ordered to pay the attorney fees of complainant in connection with this petition and that costs of Court be taxed against the respondent.

3. That respondent be punished as for a contempt.

4. Complainant prays for such other, further and different relief as may be proper.

/s/ Lillian M. Orr
Lillian M. Orr

STATE OF ALABAMA,
LEE COUNTY.

Personally appeared before, the undersigned authority, in and for said county and state, Lillian M. Orr, who is known to me, and who after being first duly sworn did depose and say that she has read the averments of the above and foregoing petition, and that the facts stated therein are true and correct.

/s/ Lillian M. Orr
Lillian M. Orr

Sworn to and subscribed before me on this the 28th day of July, 1976.

/s/ Corinne E. Panco
Notary Public, Lee County,
Alabama

FILED IN OFFICE THIS
JUL 28 1976
HAL SMITH, Register,
Circuit Court, In Equity
Lee County, Alabama

STATE OF ALABAMA, LEE COUNTY

IN THE
CIRCUIT COURT OF LEE COUNTY
IN EQUITY
AT OPELIKA, ALABAMA

LILLIAN M. ORR,	)	
	)	
Complainant,	)	
	)	
VS.	)	No. 186
	)	
WILLIAM HERBERT ORR,	)	
	)	
Respondent.	)	

DIVORCE DECREE

This cause coming on to be heard at this term, was submitted upon the Bill of Complaint, Answer and Waiver and testimony as shown by the note of submission, and upon consideration thereof, the Court is of opinion and finds that the Court has jurisdiction of the parties and of the cause of action, and that the complainant is entitled to the relief prayed for in her said Bill. It is, therefore,

ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. That the bonds of matrimony heretofore existing between the Complainant and Respondent be, and the same are hereby dissolved, and the said Lillian M. Orr is forever divorced from the said William Herbert Orr.

2. The neither the Complainant nor the Respondent shall again marry, except to each other, until sixty days after the date of this decree of divorce.

3. That William Herbert Orr, the Respondent, pay the costs herein to be taxed, for which execution may issue.

4. That the alimony and property settlement stipulation of the parties dated February 26, 1974, filed herein, is made a part of this decree by reference, as if fully set out herein, and it is hereby

ORDERED, ADJUDGED AND DECREED that said decree be implimented according to the terms of said settlement agreement, and the said agreement and stipulation of the parties is expressly made a part of this decree.

This the 26th day of February, 1974.

/s/ G. H. Wright, Jr.
Judge Circuit Court, in Equity

Filed in Office this 26 day of February, 1974.

/s/ Hal Smith
Register

STATE OF ALABAMA,	)	IN THE CIRCUIT
	)	COURT OF LEE
	)	COUNTY IN EQUITY,
LEE COUNTY.	)	AT OPELIKA

I, Hal Smith, as Register of said Court, do hereby certify that the foregoing is a full, true and correct copy of a decree rendered by said court on the 26 day of February, 1974, in a certain cause pending in said Court wherein Lillian M. Orr was Complainant, and William Herbert Orr Respondent, as the same appears of record and on file in this office.

Witness my hand and the seal of said Court, this the 26 day of July, 1974.

/s/ Hal Smith
As Register of the Circuit Court of Lee County, Alabama, In Equity.

IN RE: THE MARRIAGE OF	)	
	)	IN THE CIRCUIT
LILLIAN M. ORR,	)	COURT OF LEE
	)	COUNTY, ALABAMA,
PETITIONER,	)	FORMERLY IN
VS.	)	EQUITY
	)	
WILLIAM HERBERT ORR,	)	CASE NO. 186
	)	
RESPONDENT.	)	

STIPULATION OF PARTIES

This agreement made and entered into by and between Lillian M. Orr, petitioner, hereinafter referred to as wife, and William Herbert Orr, respondent, hereinafter referred to as husband.

WITNESSETH THAT:

WHEREAS, the above named parties are presently the petitioner and respondent, respectively, in the above styled suit for divorce, and an agreement of parties having been reached between them with respect to their property rights, alimony, and other matters in dispute in such litigation, and,

WHEREAS, the parties are desirous of entering into an agreement concerning such matters without the necessity of a hearing before the Court on the matters to which they have agreed, and,

WHEREAS, the parties desire to terminate all further marital obligations to each other, including the rights of support and maintenance of the wife by the husband, all dower and homestead rights, together with all rights existing between the parties growing out of their marriage relationship, so that all of the rights and obligations which each has against the other shall be set out in this agreement which they mutually agree shall be presented to the Court for ratification and approval,

NOW, THEREFORE, in consideration of the premises, the recitals above set forth and the mutual covenants herein provided, it is mutually agreed by and between the parties hereto, with the advice and consent of their respective attorneys of record, as follows:

1. Husband and wife may and shall continue to live separate and apart from each other and be free from each other's marital control and authority, and each shall and may reside, from time to time, at such place or places as each shall, from time to time, desire. Neither husband nor wife shall molest, annoy, or trouble the other, nor compel or endeavor to compel directly or indirectly, the other to dwell or cohabit with him or her, as the case may be. From and after the date of his agreement, neither of the parties hereto shall make any claim upon the other for any marital or nupital rights, or property rights, or rights, or rights of support, except as hereinafter set forth.

2. Husband shall, during the lifetime of the wife, or until she marries, and for and during his lifetime, pay to the wife for her support and maintenance, use and com-

fort, the sum of $1,240.00 per month, payable in two installments of $620.00 each, the first to be made payable on or before the 5th day of each consecutive month, and the second on or before the 20th of each consecutive month.

3. Husband shall pay substantially at the time of the execution of this agreement, or upon its ratification by the Court, the balance due on the purchase price of the 1973 Corvette presently being operated by wife, and shall transfer title thereto to her name solely. At the time of the execution of this agreement the balance due on the purchase price of said automobile is approximately $4,800.00. Husband further agrees that he will cause the present policy of automobile insurance of all kinds on said vehicle to be transferred to wife, and he further agrees that he will continue to pay the insurance premium on said car, or any replacement car of similar value of smaller, from year to year until wife's income equals $2,000.00 per month, as set out in paragraph 4 of this agreement. The limits of liability insurance coverage in such policy shall comply with the minimum requirements for such in the state in which the wife choses to reside.

4. At the time of the execution of this agreement husband says that husband's taxable income is $26,000.00 per year, received in salary and he receives expenses from his employer sufficient only to pay actual tax allowable business expense while on business for his employer. In the event husband's taxable income, plus any nontaxable income, such as income from tax exempt bonds, increases in the future such increase shall be divided 50-50 between husband and wife until such time as the wife's monthly alimony payment from husband shall equal $1,500.00 per month. After the alimony payment to wife reaches $1,500.00 per month any increase in hus-

band's income as above defined shall be divided between him and wife on a basis of 25% to wife and 75% to husband until the monthly alimony payment by husband to wife reaches $2,000.00 per month. Thereafter, any increase in the husband's income shall be his, without the requirement of increasing his alimony payment to wife, except as set forth in Paragraph 14.

5. Husband and wife presently own jointly a residence located at 301 Gardner Drive in the City of Auburn, Lee County, Alabama, which is described in deed to them dated October 13, 1970, from C. Sentell Harper and Janis Clements Harper, his wife, which appears of record in the office of the Judge of Probate of Lee County, Alabama, in Deed Book 842 at page 87, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof. Husband will convey to his wife his undivided interest in such property, upon her assuming the payment of the balance of the mortgage indebtedness thereon and agreeing to hold him harmless against the collection of any part thereof from him, and wife agrees to accept such conveyance to her on such terms. Upon the husband's conveying all of his interest in the said house and lot in the City of Auburn to wife she shall be obligated to continue making the mortgage payments and to relieve the husband from his obligation and to hold him harmless from making such payments in the future. If for any reason the husband makes any of these payments, at the request of the wife, he shall be reimbursed the amounts so made when the property is sold.

6. Husband will keep wife insured (and he or his employing company will pay the premium for same) with the group health and accident insurance policy maintained by his employer at its current coverage, or by his employer's subsidiary corporation; or he shall secure and

pay for comparable health and accident insurance for wife at its current coverage. Wife will be furnished proper certificate showing premium paid and insurance at all times current. In the event husband does not retain or secure such insurance husband will pay all reasonable medical and hospital bills incurred by wife.

7. Husband shall keep current and pay the premiums on life insurance policies on his life with Equitable Life Assurance Society, Provident Life Insurance Company and Mutual of New York on which wife is beneficiary and shall continue to leave wife as beneficiary thereon for the duration of this agreement, said policies being described and designated as follows:

Company	*Policy*	*Amount*
Equitable Life Assurance Society	62293019	$28,000
Provident Life Insurance Co.	E791	$50,000
Mutual of New York (with 20 year declining term)	9744490NY	$30,000

Husband shall not borrow against these policies, use them as security or in any way lessen their value. If husband should fail to pay any premium when due, then wife may pay same and recover the amount so paid from husband, together with a reasonable attorney's fee for so collecting.

8. Husband agrees to pay solicitors' fees for the solicitors of record for wife as follows: For Frank J. Tipler, Jr., the sum of $2,500.00 payable in full at the time of execution of this agreement. For William F. Horsley, the sum of $1,000.00 payable in full at said time. If it shall hereafter be necessary for wife to employ counsel to enforce or modify this agreement or to take any other action not herein referred to, wife reserves the right to apply to this Court for such attorneys' fees and costs as she may then have incurred thereby, and husband agrees

to pay the reasonable fees and costs so set by the Court in this event.

9. Husband agrees that he will furnish wife with copy of his personal federal income tax return, and a certified statement of other monies or things of value received by inheritance, gift or loan from his father or mother for each year during the life of his agreement until his income is sufficiently high for him to be required to pay $2,000.00 per month as alimony to wife; and any great change, by inheritance for otherwise, thereafter. At the time husband furnishes a copy of his personal federal income tax return to wife he shall also furnish to her a statement from the appropriate officer of any corporation by which he is employed to the effect that all reimbursements for expenses are for actual expenses incurred, only. If there are any expenses which have not actually been incurred by husband, the statement from the appropriate officer of the corporation shall so show.

10. Wife and husband agree that they will not at any time hereafter contract any debt, charge or liability whatsoever for which the other or his property or estate shall be or may be liable or answerable except as set forth in this agreement.

11. There are no children of the marriage of husband and wife.

12. This agreement has been agreed to by wife as sufficient to meet wife's present needs and within husband's present ability to pay based solely on the information heretofore made available by husband in his deposition given on June 19, 1973. If it should hereafter be that husband's information in this respect was materially inaccurate, incomplete, or otherwise not candid, full or complete, it is understood and agreed that wife reserves the right to reopen the question of her support and the

amount thereof, and failing agreement between the parties in respect thereto, to resort to this Court to seek modification thereof.

13. Husband has prepared all income tax returns over the past few years and will do so for 1973. Husband agrees to indemnify and hold wife harmless, and to defend wife against all claims by taxing authorities for deficiencies, penalties or assessments arising from such returns and will pay all such assessments, penalties or deficiencies. After exhausting all legal remedies to contest same, husband will reimburse wife for the amount of any such assessments, penalties or deficiencies which wife may be required to pay, (particularly should it be necessary for wife to pay them in order to clear title to the Gardner Drive residence), and husband, will pay wife's reasonable attorneys' fees and costs, if husband doesn't properly defend wife, incurred by her in resisting such tax assessments, penalties or deficiencies. Husband will prepare and both will sign (based on what husband certifies as correct) the 1973 state and federal income tax returns and husband will pay any amount due or receive any refunds.

14. In the event the financial status of either of the parties hereto should greatly change (by inheritance or otherwise) from the present this agreement may be renegotiated and submitted to this Court for modification or in the absence of agreement submitted to this Court for determination. However, remarriage of the husband or new responsibilities of the husband shall be no ground for seeking a change in this agreement; nor shall the wife's earned income, unless her total income from alimony and earnings equal more than $2,000.00 per month. If the wife total income from both earnings and alimony for a year average more than $2,000.00 per

month, husband shall be entitled to reduce his alimony payments for the following year to a point where wife's total income shall not be more than $2,000.00 a month for a yearly average; provided, however, that husband's alimony payments shall not be reduced below $1,240.00 (the amount which he is presently required to pay) regardless of the wife's earnings.

15. Husband and wife shall at any time or times hereafter make, execute and deliver any and all further instruments, papers or documents as the other shall reasonably require for the purpose of giving full effect to this agreement and to the covenants and provisions herein contained.

16. Both husband and wife hereby represent to each other that in the negotiation, consideration, execution and delivery of this agreement, each has been represented by counsel of his or her own choosing, and each has been advised of his or her rights in the premises, and that each understands those rights and covenants and agrees that the terms set forth in this agreement are fair and reasonable.

17. This agreement shall be presented to the Court in which the aforesaid divorce proceeding is presently pending with the understanding that the parties shall each move or petition the Court to ratify and confirm this agreement and to make the same a part of any decree which is entered in such proceedings.

18. This agreement is entire and complete and contains all of the understandings and agreements between the parties and their respective attorneys; and no other representations, agreements, undertakings, or warranties of any kind or nature have been made by either of the parties to the other to induce the making and execution of this agreement; and each of the parties does hereby agree

not to assert to the contrary and further represents to the other that there is no other or different agreement between them. The terms and conditions of this agreement shall not be altered or modified except by written agreement signed by both parties hereto, or by this Court.

19. All of the terms, provisions, covenants and agreements contained in this agreement shall inure to and be binding upon the parties hereto and their respective heirs, assigns, executors, administrators and legal representatives.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on this the 26 day of February, 1974.

/s/ Lillian M. Orr
Lillian M. Orr

APPROVED ON BEHALF
OF WIFE:

/s/ W. F. Horsley
ATTORNEY OF RECORD

/s/William H. Orr
William H. Orr

APPROVED ON BEHALF OF
HUSBAND:

/s/ Jacob Walker, Jr.
ATTORNEY OF RECORD

FILED IN OFFICE THIS
Feb 26 1974
/s/ Hal Smith, REGISTER
CIRCUIT COURT, IN EQUITY
LEE COUNTY, ALABAMA

IN THE CIRCUIT COURT OF
LEE COUNTY, ALABAMA.

IN RE THE MARRIAGE OF	*	
LILLIAN M. ORR and	*	CASE NO. 186
WILLIAM HERBERT ORR.	*	

MOTION

Comes now specially appearing, William Herbert Orr, the Respondent in the above styled cause, and respectfully represents unto this Honorable Court as follows:

1. That this Court on, to-wit, February 26, 1974, rendered a decree of divorce forever dissolving the bonds of matrimony between the parties hereto.

2. That said decree of divorce was an illegal decree being rendered in reliance on *Code of Alabama,* Title 34, §§31-33, which grant an allowance to the wife on decree of divorce.

3. That *Code of Alabama,* Title 34, §§31-33 are unconstitutional because only a divorced husband is obligated to pay alimony under the statutes, thereby arbitrarily discriminating against male spouses, and thus depriving the husband of due process and equal protection of the law.

WHEREFORE, your Respondent moves the Court for an order decreeing that:

1. *Code of Alabama,* Title 34, §§31-33 arbitrarily discriminate against male spouses and thus are in violation of the equal protection clause of the United States Constitution and thereby are unconstitutional.

2. A permanent injunction be issued against the continued enforcement of these statutes.

3. The decree ordering your Respondent to pay the Complainant alimony be rendered null and void.

/s/ John L. Capell
John L. Capell, Attorney for Respondent

OF COUNSEL:

Capell, Howard, Knabe & Cobbs, P.A.
Post Office Box 2069
Montgomery, Alabama 36103
(205) 262-1671

LILLIAN M. ORR,) IN THE CIRCUIT COURT OF
Complainant,) LEE COUNTY, ALABAMA
VS.) CIVIL ACTION
WILLIAM HERBERT ORR,) NO. 186
Respondent.)

ORDER DENYING MOTION

On August 19, 1976, the respondent, William Herbert Orr, appeared specially, and filed in this Court his motion seeking a decree by this Court that *Code of Alabama,* Title 34, Sections 31-33 are unconstitutional, and further seeking an injunction against the continued enforcement of the statutes, and a judgment declaring the Divorce Decree in this case granting alimony to complainant be rendered null and void.

The Court has carefully considered said motion, and the memorandum submitted in support of the said motion, and the Court is of the opinion that this motion should be overruled and denied. It is, therefore,

ORDERED, ADJUDGED, AND DECREED by the Court that the respondent's motion, referred to above, be and the same is hereby overruled and denied.

DONE this the 19th day of August, 1976.

/s/ G. H. Wright, Jr.
Circuit Judge

NOTE TO CLERK: The Clerk is instructed to send a copy of this Order to Capell, Howard, Knabe & Cobbs, P.A., Attorneys for Respondent, at Post Office Box

2069, Montgomery, Alabama, 36103; and W. F. Horsley, Attorney for Complainant, at Post Office Box 2345, Opelika, Alabama, 36801.

/s/ G. H. Wright, Jr.
Circuit Judge

[FILED IN OFFICE THIS
Aug 19 1976
HAL SMITH, Register
Circuit Court, In Equity
Lee County, Alabama]

IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

LILLIAN M. ORR,)
Complainant,)
v.) CIVIL ACTION
WILLIAM HERBERT ORR,) NO. 186
Respondent.)

JUDGMENT

On July 28, 1976, the complainant, Lillian M. Orr, filed her petition for Rule to Show Cause and Judgment in this Court. By Order of this Court dated July 28, 1976, the said Petition was set for hearing on August 19, 1976 in this Court, and the respondent, William Herbert Orr, was ordered to appear in this Court on August 19, 1976, at 9:00 a.m. to show cause why he should not be adjudged in contempt of this Court for refusing to abide by its decree.

The Order granting a hearing on the Petition described above and the Petition were served on the Respondent, William Herbert Orr, by registered mail on August 2, 1976, and the return receipt showing service was filed in the office of the Clerk of the Circuit Court of Lee County, Alabama, on August 4, 1976.

On Thursday, August 19, 1976, at 9:00 a.m. Honorable John L. Capell, an attorney representing the respondent, appeared specially on behalf of the respondent in this Court, and filed a motion challenging the constitutionality of certain Alabama divorce laws and asking that the Divorce Decree in this case be declared null and void. No general appearance was made by the respondent or his attorney. The said motion was overruled and denied on this date. When the Court overruled and denied the said motion the said attorney representing the respondent left the Courtroom.

The complainant, Lillian M. Orr, appeared with her attorney, the Honorable W. F. Horsley, in this Court on Thursday, August 19, 1976, at 9:00 a.m. at which time the complainant's petition was called for hearing. No one appeared generally for the respondent, William Herbert Orr. The witnesses were duly sworn and testimony was taken ore tenus before the Court. The Court has carefully considered the testimony in this case, and makes the findings of fact described below.

The Court finds from the evidence that the parties to this case for divorce by decree of this Court dated February 26, 1974, which said decree incorporated therein a stipulation of the parties entered into between the parties on February 26, 1974, which is on file in this case. This stipulation provides that the respondent make alimony payments to the complainant in monthly

amounts of $1,656.00, said payments to be made in the amount of $828.00 per payment on the 5th and 20th of each month.

The last payment made by the respondent to the complainant was in the amount of $828.00, and was made on June 5, 1976. Respondent has not made payments to the complainant as provided by the Decree of Divorce on June 20, 1976, July 5, 1976, July 20, 1976, and August 5, 1976. The respondent is in arrears in his alimony payments in the total amount, as of this date, of $3,312.00.

The Decree of Divorce in this case further provides that respondent pay the premiums on the policy of insurance covering complainant's automobile. A premium in the amount of $212.00 has been due and payable since May 15, 1976, but has not been paid, as of this date, by the respondent.

The Court further finds from the evidence that the complainant has been required to employ attorneys in the State of Alabama and in the State of California (where respondent now resides) to enforce the Divorce Decree of this Court, and the Court finds that a reasonable attorney fee for said attorneys is in the amount of $2,000.00. The Court notes and finds that extensive work has been required of the attorneys for the complainant to enforce the Order of this Court.

IT IS ORDERED, ADJUDGED, AND DECREED by the Court as follows:

1. That the complainant, Lillian M. Orr, have and recover of the respondent, William Herbert Orr, the total sum of $5,524.00 (which sum is made up of $3,312.00 in alimony, $212.00 due for payment of the premium on an insurance policy, and $2000.00 in attorney fees).

2. Costs of Court are taxed against the respondent.

3. Execution may issue for the recovery of the judgment and costs of Court.

4. That the Clerk of this Court mail a copy of this Order, postage prepaid, to the following:

Honorable W. F. Horsley
Samford, Denson, Horsley & Pettey
Post Office Box 2345
Opelika, AL 36801

Honorable John L. Capell
Capell, Howard, Knabe & Cobbs, P.A.
Post Office Box 2069
Montgomery, AL 36103

Mr. William Herbert Orr
Orrox Corporation
3303 Scott Blvd.
Santa Clara, CA 95050

DONE this the 19th day of August, 1976.

/s/ G. H. Wright Jr.
Circuit Judge

FILED IN OFFICE THIS
Aug 19, 1976
HAL SMITH, Register
Circuit Court, In
Equity Lee County,
Alabama]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS OR TO AFFIRM

W. F. HORSLEY
Post Office Box 2345
Opelika, Alabama 36801
Attorney for Appellee.

Of Counsel:
SAMFORD, DENSON, HORSLEY & PETTEY
Post Office Box 2345
Opelika, Alabama 36801

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS OR TO AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that the appeal presents no substantial federal question.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTES

The Appellant takes the position that the Alabama Alimony Statutes[1] are unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. These statutes provide that the Court, in the event of a divorce, has the discretion to award alimony to the divorced wife. The statutes do not make provision for an alimony award to a divorced husband.

B. THE PROCEEDINGS BELOW

The parties were divorced by decree of the Circuit Court of Lee County, Alabama, dated February 26, 1974. A copy of the decree is attached as Appendix A. The decree orders Appellant to make bi-monthly alimony payments to the Appellee.

On July 28, 1976, the Appellee filed a petition for rule to show cause and for judgment in the Circuit Court of Lee County, Alabama, alleging that the Appellant was in contempt of Court for his failure to make alimony payments to the Appellee as required by the decree. A copy of the petition is attached as Appendix B. Appellant responded to the petition by filing a motion with the Circuit Court of Lee County, Alabama, to enjoin enforcement of the alimony award in the divorce decree on the ground that the Alabama Alimony Statutes are unconstitutional. The motion was denied by the Circuit Court of

[1] *Code of Ala.* 1975 Sections 30-2-51 through 30-2-53. These statutes formerly appeared in the *Code of Alabama* as Title 34, Sections 31-33 (1940) (Recomp. 1958).

Lee County, Alabama, on August 19, 1976. The motion and the order denying the motion are attached to Appellant's Jurisdictional Statement as a portion of Appendix D.[2]

The Appellee's petition for rule to show cause and for judgment was granted by the Circuit Court of Lee County, Alabama, on August 19, 1976, and the Appellant appealed that judgment to the Court of Civil Appeals of Alabama. The judgment is attached to Appellant's Jurisdictional Statement as a portion of Appendix B.[3]

The Alabama Court of Civil Appeals affirmed the action of the trial court in granting judgment to Appellee, and after having granted Appellant's petition for certiorari, the Supreme Court of Alabama quashed the petition for writ of certiorari as being improvidently granted. The decisions of the Alabama Court of Civil Appeals and the Alabama Supreme Court are attached to Appellant's Jurisdictional Statement as Appendix A.[4]

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The issue raised by this appeal does not involve a substantial federal question because the question has been foreclosed by previous decisions of this Court. The issue presented by this appeal is the same as the issue presented

[2] Appellant's Jurisdictional Statement pp. 22a-24a.

[3] Appellant's Jurisdictional Statement pp. 16a-19a.

[4] Appellant's Jurisdictional Statement pp. 1a-13a. *Orr v. Orr*, Ala. Civ. App. 351 So.2d 904 (1977), *petition for cert. quashed*, Ala. 351 So.2d 906 (1977).

in *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), and this Court denied certiorari in that case at 421 U.S. 929 (1975). In *Murphy* the divorced husband challenged the constitutionality of the Georgia Alimony Statute because it only authorized an award of alimony to the divorced wife. Insofar as the issues raised by this appeal are concerned the Georgia and Alabama Alimony Laws are the same. The Georgia Court held that the Law was constitutional. Appellant asserts that *Murphy*, when presented to this Court, was in a "confused posture" because review was sought by certiorari rather than appeal.[5] The fact that review was sought by certiorari should not be confusing since 28 U.S.C. Section 1257(3) authorizes such review. *Stanley v. Illinois*, 405 U.S. 645 (1972), relied on by Appellant,[6] came to this Court on certiorari.

Appellate Courts in Alabama, Georgia, and Louisiana have considered this Court's opinion in *Kahn v. Shevin*, 416 U.S. 351 (1974) to be dispositive of the issue presented by this appeal.[7]

In the *Kahn* case the issue was the constitutionality of a Florida statute which granted a property tax exemption to widows, but offered no analogous benefit for widowers. This Court upheld the constitutionality of the law which admittedly conferred an economic benefit on females which was withheld from males. The Court observed that the object of the Florida statute was to reduce the disparity between the economic capabilities

[5] Appellant's Jurisdictional Statement p. 6.

[6] Appellant's Jurisdictional Statement p. 6.

[7] *Orr v. Orr*, Ala. Civ. App. 351 So.2d 904 (1977); *Murphy v. Murphy, supra; Dill v. Dill*, 232 Ga. 231, 206 S.E.2d 6 (1974); and *Whitt v. Vauthier*, La. App. 316 So.2d 202 (1975).

of men and women, and the classification of the statute was valid because it bore a "fair and substantial" relation to that object. The Court noted that the financial difficulties confronting "the lone woman" exceed the difficulties facing men, and the difficulties are especially acute for the woman who was formerly married and probably economically dependent on her husband. In *Kahn* the Court was dealing with widows, but the divorced female finds herself just as economically alone and deprived as the widow. The Court reasoned that the Florida statute furthered the State policy, "of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."

The ratio decidendi established by *Kahn* is that a state statute which confers an economic benefit on females, without awarding the same benefits to males, is not violative of the Equal Protection Clause of the Constitution.

In his Jurisdictional Statement the Appellant has cited two cases in which this Court struck down statutes favoring females[8]—*Stanley v. Illinois*, 405 U.S. 645 (1972) and *Craig v. Boren*, 429 U.S. 190 (1976). These cases are inapplicable because the statutes there challenged did not confer an *economic* benefit on females. The statute in *Stanley* favored females in child custody proceedings, and the statute in *Craig* favored females in the purchase of alcoholic beverages. The principles enunciated in *Kahn* could not save the statutes, since *Kahn* stands for the proposition that legislation designed to *economically* benefit lone women is constitutional because lone women have historically been the objects of economic deprivation. Thus, *Kahn* is applicable to the issues in this case involving the Alabama Alimony Law, but it was inapplicable to

[8] Appellant's Jurisdictional Statement pp. 6-7.

the non-economic statutes in *Stanley* and *Craig*. The statutes in *Stanley* and *Craig* were not designed to "cushion the financial impact of spousal loss."

In the remaining Supreme Court cases cited by Appellant, where a gender-based classification was at issue,[9] the challenged statutes economically discriminated in favor of *males*, and this Court found the statutes to be unconstitutional, since no valid objective could be accomplished by statutes which favored a class that was already favored. Appellant cited *Stanton v. Stanton*, 421 U.S. 7 (1975), *Reed v. Reed*, 404 U.S. 71 (1971), and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). In *Stanton* the statute gave preference to men since it required parental support for male children to age 21, while the parental duty of support for female children terminated at age 18. The statute in *Reed* gave preference to men over women in serving as administrators of estates. In *Weinberger* the Social Security Act provided for benefits to widows, but not widowers, and this discriminated against women because it prevented the woman from earning benefits for her surviving spouse, whereas men could earn such benefits. All of these statutes which economically discriminated in favor of males were properly held unconstitutional, and are not in conflict with *Kahn v. Shevin, supra.*

This Court followed *Kahn v. Shevin, supra,* in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), where it upheld a law giving preference to female naval officers over male naval officers. The Court reasoned that Congress may have rationally believed that the women officers had

[9] *Levy v. Louisiana*, 391 U.S. 68 (1968), also cited by Appellant, was not concerned with a gender-based classification in a statute, and is, for that reason, inapplicable here.

less opportunity for promotion, so this would justify the law which gave the women a longer period of tenure.

III.

CONCLUSION

Because this Court has previously decided the issue raised by this appeal, no substantial federal question is presented, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of Alabama.

Respectfully submitted,

W. F. HORSLEY
Post Office Box 2345
Opelika, Alabama 36801
Attorney for Appellee.

Of Counsel:

SAMFORD, DENSON, HORSLEY, & PETTEY
Post Office Box 2345
Opelika, Alabama 36801

APPENDIX

APPENDIX A

STATE OF ALABAMA, LEE COUNTY

IN THE
CIRCUIT COURT OF LEE COUNTY
IN EQUITY
AT OPELIKA, ALABAMA

LILLIAN M. ORR,	)	
	)	
Complainant,	)	
	)	
VS.	)	No. 186
	)	
WILLIAM HERBERT ORR,	)	
	)	
Respondent.	)	

DIVORCE DECREE

This cause coming on to be heard at this term, was submitted upon the Bill of Complaint, Answer and Waiver and testimony as shown by the note of submission, and upon consideration thereof, the Court is of opinion and finds that the Court has jurisdiction of the parties and of the cause of action, and that the complainant is entitled to the relief prayed for in her said Bill. It is, therefore,

ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. That the bonds of matrimony heretofore existing between the Complainant and Respondent be, and the same are hereby dissolved, and the said Lillian M. Orr is forever divorced from the said William Herbert Orr.

2. The neither the Complainant nor the Respondent shall again marry, except to each other, until sixty days after the date of this decree of divorce.

3. That William Herbert Orr, the Respondent, pay the costs herein to be taxed, for which execution may issue.

4. That the alimony and property settlement stipulation of the parties dated February 26, 1974, filed herein, is made a part of this decree by reference, as if fully set out herein, and it is hereby

ORDERED, ADJUDGED AND DECREED that said decree be implimented according to the terms of said settlement agreement, and the said agreement and stipulation of the parties is expressly made a part of this decree.

This the 26th day of February, 1974.

/s/ G. H. Wright, Jr.
Judge Circuit Court, in Equity

Filed in Office this 26 day of February, 1974.

/s/ Hal Smith
Register

STATE OF ALABAMA,	)	IN THE CIRCUIT
	)	COURT OF LEE
	)	COUNTY IN EQUITY,
LEE COUNTY.	)	AT OPELIKA

I, Hal Smith, as Register of said Court, do hereby certify that the foregoing is a full, true and correct copy of a decree rendered by said court on the 26 day of February, 1974, in a certain cause pending in said Court wherein Lillian M. Orr was Complainant, and William Herbert Orr Respondent, as the same appears of record and on file in this office.

Witness my hand and the seal of said Court, this the 26 day of July, 1974.

/s/ Hal Smith
As Register of the Circuit Court of Lee County, Alabama, In Equity.

IN RE: THE MARRIAGE OF	)	
	)	IN THE CIRCUIT
LILLIAN M. ORR,	)	COURT OF LEE
	)	COUNTY, ALABAMA,
PETITIONER,	)	FORMERLY IN
VS.	)	EQUITY
	)	
WILLIAM HERBERT ORR,	)	CASE NO. 186
	)	
RESPONDENT.	)	

STIPULATION OF PARTIES

This agreement made and entered into by and between Lillian M. Orr, petitioner, hereinafter referred to as wife, and William Herbert Orr, respondent, hereinafter referred to as husband.

WITNESSETH THAT:

WHEREAS, the above named parties are presently the petitioner and respondent, respectively, in the above styled suit for divorce, and an agreement of parties having been reached between them with respect to their property rights, alimony, and other matters in dispute in such litigation, and,

WHEREAS, the parties are desirous of entering into an agreement concerning such matters without the necessity of a hearing before the Court on the matters to which they have agreed, and,

WHEREAS, the parties desire to terminate all further marital obligations to each other, including the rights of support and maintenance of the wife by the husband, all dower and homestead rights, together with all rights existing between the parties growing out of their marriage relationship, so that all of the rights and obligations which each has against the other shall be set out in this agreement which they mutually agree shall be presented to the Court for ratification and approval,

NOW, THEREFORE, in consideration of the premises, the recitals above set forth and the mutual covenants herein provided, it is mutually agreed by and between the parties hereto, with the advice and consent of their respective attorneys of record, as follows:

1. Husband and wife may and shall continue to live separate and apart from each other and be free from each other's marital control and authority, and each shall and may reside, from time to time, at such place or places as each shall, from time to time, desire. Neither husband nor wife shall molest, annoy, or trouble the other, nor compel or endeavor to compel directly or indirectly, the other to dwell or cohabit with him or her, as the case may be. From and after the date of his agreement, neither of the parties hereto shall make any claim upon the other for any marital or nupital rights, or property rights, or rights, or rights of support, except as hereinafter set forth.

2. Husband shall, during the lifetime of the wife, or until she marries, and for and during his lifetime, pay to the wife for her support and maintenance, use and com-

fort, the sum of $1,240.00 per month, payable in two installments of $620.00 each, the first to be made payable on or before the 5th day of each consecutive month, and the second on or before the 20th of each consecutive month.

3. Husband shall pay substantially at the time of the execution of this agreement, or upon its ratification by the Court, the balance due on the purchase price of the 1973 Corvette presently being operated by wife, and shall transfer title thereto to her name solely. At the time of the execution of this agreement the balance due on the purchase price of said automobile is approximately $4,800.00. Husband further agrees that he will cause the present policy of automobile insurance of all kinds on said vehicle to be transferred to wife, and he further agrees that he will continue to pay the insurance premium on said car, or any replacement car of similar value of smaller, from year to year until wife's income equals $2,000.00 per month, as set out in paragraph 4 of this agreement. The limits of liability insurance coverage in such policy shall comply with the minimum requirements for such in the state in which the wife choses to reside.

4. At the time of the execution of this agreement husband says that husband's taxable income is $26,000.00 per year, received in salary and he receives expenses from his employer sufficient only to pay actual tax allowable business expense while on business for his employer. In the event husband's taxable income, plus any nontaxable income, such as income from tax exempt bonds, increases in the future such increase shall be divided 50-50 between husband and wife until such time as the wife's monthly alimony payment from husband shall equal $1,500.00 per month. After the alimony payment to wife reaches $1,500.00 per month any increase in hus-

band's income as above defined shall be divided between him and wife on a basis of 25% to wife and 75% to husband until the monthly alimony payment by husband to wife reaches $2,000.00 per month. Thereafter, any increase in the husband's income shall be his, without the requirement of increasing his alimony payment to wife, except as set forth in Paragraph 14.

5. Husband and wife presently own jointly a residence located at 301 Gardner Drive in the City of Auburn, Lee County, Alabama, which is described in deed to them dated October 13, 1970, from C. Sentell Harper and Janis Clements Harper, his wife, which appears of record in the office of the Judge of Probate of Lee County, Alabama, in Deed Book 842 at page 87, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof. Husband will convey to his wife his undivided interest in such property, upon her assuming the payment of the balance of the mortgage indebtedness thereon and agreeing to hold him harmless against the collection of any part thereof from him, and wife agrees to accept such conveyance to her on such terms. Upon the husband's conveying all of his interest in the said house and lot in the City of Auburn to wife she shall be obligated to continue making the mortgage payments and to relieve the husband from his obligation and to hold him harmless from making such payments in the future. If for any reason the husband makes any of these payments, at the request of the wife, he shall be reimbursed the amounts so made when the property is sold.

6. Husband will keep wife insured (and he or his employing company will pay the premium for same) with the group health and accident insurance policy maintained by his employer at its current coverage, or by his employer's subsidiary corporation; or he shall secure and

pay for comparable health and accident insurance for wife at its current coverage. Wife will be furnished proper certificate showing premium paid and insurance at all times current. In the event husband does not retain or secure such insurance husband will pay all reasonable medical and hospital bills incurred by wife.

7. Husband shall keep current and pay the premiums on life insurance policies on his life with Equitable Life Assurance Society, Provident Life Insurance Company and Mutual of New York on which wife is beneficiary and shall continue to leave wife as beneficiary thereon for the duration of this agreement, said policies being described and designated as follows:

Company	*Policy*	*Amount*
Equitable Life Assurance Society	62293019	$28,000
Provident Life Insurance Co.	E791	$50,000
Mutual of New York (with 20 year declining term)	9744490NY	$30,000

Husband shall not borrow against these policies, use them as security or in any way lessen their value. If husband should fail to pay any premium when due, then wife may pay same and recover the amount so paid from husband, together with a reasonable attorney's fee for so collecting.

8. Husband agrees to pay solicitors' fees for the solicitors of record for wife as follows: For Frank J. Tipler, Jr., the sum of $2,500.00 payable in full at the time of execution of this agreement. For William F. Horsley, the sum of $1,000.00 payable in full at said time. If it shall hereafter be necessary for wife to employ counsel to enforce or modify this agreement or to take any other action not herein referred to, wife reserves the right to apply to this Court for such attorneys' fees and costs as she may then have incurred thereby, and husband agrees

to pay the reasonable fees and costs so set by the Court in this event.

9. Husband agrees that he will furnish wife with copy of his personal federal income tax return, and a certified statement of other monies or things of value received by inheritance, gift or loan from his father or mother for each year during the life of his agreement until his income is sufficiently high for him to be required to pay $2,000.00 per month as alimony to wife; and any great change, by inheritance for otherwise, thereafter. At the time husband furnishes a copy of his personal federal income tax return to wife he shall also furnish to her a statement from the appropriate officer of any corporation by which he is employed to the effect that all reimbursements for expenses are for actual expenses incurred, only. If there are any expenses which have not actually been incurred by husband, the statement from the appropriate officer of the corporation shall so show.

10. Wife and husband agree that they will not at any time hereafter contract any debt, charge or liability whatsoever for which the other or his property or estate shall be or may be liable or answerable except as set forth in this agreement.

11. There are no children of the marriage of husband and wife.

12. This agreement has been agreed to by wife as sufficient to meet wife's present needs and within husband's present ability to pay based solely on the information heretofore made available by husband in his deposition given on June 19, 1973. If it should hereafter be that husband's information in this respect was materially inaccurate, incomplete, or otherwise not candid, full or complete, it is understood and agreed that wife reserves the right to reopen the question of her support and the

amount thereof, and failing agreement between the parties in respect thereto, to resort to this Court to seek modification thereof.

13. Husband has prepared all income tax returns over the past few years and will do so for 1973. Husband agrees to indemnify and hold wife harmless, and to defend wife against all claims by taxing authorities for deficiencies, penalties or assessments arising from such returns and will pay all such assessments, penalties or deficiencies. After exhausting all legal remedies to contest same, husband will reimburse wife for the amount of any such assessments, penalties or deficiencies which wife may be required to pay, (particularly should it be necessary for wife to pay them in order to clear title to the Gardner Drive residence), and husband, will pay wife's reasonable attorneys' fees and costs, if husband doesn't properly defend wife, incurred by her in resisting such tax assessments, penalties or deficiencies. Husband will prepare and both will sign (based on what husband certifies as correct) the 1973 state and federal income tax returns and husband will pay any amount due or receive any refunds.

14. In the event the financial status of either of the parties hereto should greatly change (by inheritance or otherwise) from the present this agreement may be renegotiated and submitted to this Court for modification or in the absence of agreement submitted to this Court for determination. However, remarriage of the husband or new responsibilities of the husband shall be no ground for seeking a change in this agreement; nor shall the wife's earned income, unless her total income from alimony and earnings equal more than $2,000.00 per month. If the wife total income from both earnings and alimony for a year average more than $2,000.00 per

month, husband shall be entitled to reduce his alimony payments for the following year to a point where wife's total income shall not be more than $2,000.00 a month for a yearly average; provided, however, that husband's alimony payments shall not be reduced below $1,240.00 (the amount which he is presently required to pay) regardless of the wife's earnings.

15. Husband and wife shall at any time or times hereafter make, execute and deliver any and all further instruments, papers or documents as the other shall reasonably require for the purpose of giving full effect to this agreement and to the covenants and provisions herein contained.

16. Both husband and wife hereby represent to each other that in the negotiation, consideration, execution and delivery of this agreement, each has been represented by counsel of his or her own choosing, and each has been advised of his or her rights in the premises, and that each understands those rights and covenants and agrees that the terms set forth in this agreement are fair and reasonable.

17. This agreement shall be presented to the Court in which the aforesaid divorce proceeding is presently pending with the understanding that the parties shall each move or petition the Court to ratify and confirm this agreement and to make the same a part of any decree which is entered in such proceedings.

18. This agreement is entire and complete and contains all of the understandings and agreements between the parties and their respective attorneys; and no other representations, agreements, undertakings, or warranties of any kind or nature have been made by either of the parties to the other to induce the making and execution of this agreement; and each of the parties does hereby agree

not to assert to the contrary and further represents to the other that there is no other or different agreement between them. The terms and conditions of this agreement shall not be altered or modified except by written agreement signed by both parties hereto, or by this Court.

19. All of the terms, provisions, covenants and agreements contained in this agreement shall inure to and be binding upon the parties hereto and their respective heirs, assigns, executors, administrators and legal representatives.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on this the 26 day of February, 1974.

/s/ Lillian M. Orr
Lillian M. Orr

APPROVED ON BEHALF
OF WIFE:

/s/ W. F. Horsley
ATTORNEY OF RECORD

/s/William H. Orr
William H. Orr

APPROVED ON BEHALF OF
HUSBAND:

/s/ Jacob Walker, Jr.
ATTORNEY OF RECORD

FILED IN OFFICE THIS
Feb 26 1974
/s/ Hal Smith, REGISTER
CIRCUIT COURT, IN EQUITY
LEE COUNTY, ALABAMA

APPENDIX B

IN THE CIRCUIT COURT OF
LEE COUNTY, ALABAMA

IN RE: THE MARRIAGE OF	)	
	)	
LILLIAN M. ORR AND	)	
	)	
WILLIAM HERBERT ORR.	)	
	)	
	)	CASE NO. 186
	)	
LILLIAN M. ORR,	)	
	)	
COMPLAINANT,	)	
	)	
VS.	)	
	)	
WILLIAM HERBERT ORR,	)	
	)	
RESPONDENT.	)	

PETITION FOR RULE TO SHOW CAUSE AND FOR JUDGMENT

Comes now Lillian M. Orr, complainant in the above styled cause, and represents and shows unto this Honorable Court as follows:

1. That this Court on, to-wit, February 26, 1974, rendered a decree of divorce forever dissolving the bonds of matrimony between the parties hereto.

2. The said decree of dicorce (a copy of which is marked Exhibit "A", attached hereto, and made a part

hereof by reference) provides, *inter alia* that the respondent will pay to the complainant $1,656.00 per month as alimony, said payments to be made in the amount of $828.00 per payment on the 5th and 20th of each month.

3. Complainant alleges that the last payment made to her by respondent was in the amount of $828.00, and was made on June 5, 1976. The payments for June 20, 1976, July 5, 1976, and July 20, 1976, have not been made by respondent as ordered by said divorce decree, and the said respondent is in arrears on said payments in the amount of $2,484.00, and the said sum of $2,484.00 is due and owing to complainant.

4. Complainant says that respondent's failure to make said payments as required by the divorce decree has been willful and contemptuous.

THE PREMISES CONSIDERED, your petitioner prays that the Court grant the following relief:

1. Respondent be ordered to pay, as alimony, all sums which he has failed and refused to pay since June 5, 1976, said amount to be calculated at the rate of $828.00 due on the 5th and 20th of each month, to the date of the hearing of this petition.

2. That respondent be ordered to pay the attorney fees of complainant in connection with this petition and that costs of Court be taxed against the respondent.

3. That respondent be punished as for a contempt.

4. Complainant prays for such other, further and different relief as may be proper.

/s/ Lillian M. Orr
Lillian M. Orr

STATE OF ALABAMA,
LEE COUNTY.

Personally appeared before, the undersigned authority, in and for said county and state, Lillian M. Orr, who is known to me, and who after being first duly sworn did depose and say that she has read the averments of the above and foregoing petition, and that the facts stated therein are true and correct.

/s/ Lillian M. Orr
Lillian M. Orr

Sworn to and subscribed before me on this the 28th day of July, 1976.

/s/ Corinne E. Panco
Notary Public, Lee County,
Alabama

FILED IN OFFICE THIS
JUL 28 1976
HAL SMITH, Register,
Circuit Court, In Equity
Lee County, Alabama

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLANT

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Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Orr v. Orr,* Ala., 351 So.2d 906 (1977). The opinion of the Court of Civil Appeals of Alabama is reported as *Orr v. Orr,* Ala.Civ.App., 351 So.2d 904 (1977). The Circuit Court of Lee County, Alabama, did not issue an opinion.

JURISDICTION

The Order of the Supreme Court of Alabama from which Mr. Orr appeals was entered on November 10,

1977. On January 30, 1977, Mr. Orr properly filed his Notices of Appeal, and on February 8, 1977, Mr. Orr filed his Jurisdictional Statement with this Court. On May 30, 1978, this Court noted probable jurisdiction in this appeal. On June 21, 1978, Mr. Orr requested from the Clerk of this Court an extension of time in which to file his brief. On June 23 the Clerk of this Court granted Mr. Orr's request and extended the time for the filing of his brief through July 31, 1978.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

QUESTION PRESENTED

The ultimate question presented is whether Alabama's alimony statutes are constitutional. By the statutes' terms, only a man can be required to pay alimony, and this distinction between men and women gives rise to Mr. Orr's question. Specifically: Do these statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by virtue of their absolute reliance on a gender-based classification?

STATEMENT OF THE CASE

This proceeding began in the Circuit Court of Lee County, Alabama, as a contempt action brought against Mr. Orr to enforce the terms of a divorce decree issued by that court on February 26, 1974. On June 28, 1976, Ms. Orr filed in the Circuit Court a Petition for Rule to Show Cause and for Judgment asking that judgment be entered against Mr. Orr for accrued but unpaid alimony, for her attorney's fees and costs generated by her petition, and for contempt (App., p. 3). On August 19, 1976, at the hearing of Ms. Orr's petition, Mr. Orr submitted in his defense a motion requesting that Alabama's alimony statutes be declared unconstitutional (App., p. 16). On

that same day, the Circuit Court denied Mr. Orr's motion (App., p. 18) and entered judgment against Mr. Orr for $3,312.00 due as accrued alimony, $212.00 due as insurance premiums and $2,000 awarded as fees to Ms. Orr's attorneys (App., p. 21). In its judgment, the Circuit Court did not refer to any authority supporting the constitutionality of the challenged statutes and did not exhibit its rationale for upholding their constitutionality.

Relying solely on the unconstitutionality of Alabama's alimony statutes, Mr. Orr appealed the judgment of the Circuit Court. On March 16, 1977, the Court of Civil Appeals of Alabama affirmed that judgment and upheld the constitutionality of these statutes. The opinion issued by that court relied on *Murphy v. Murphy*, 232 Ga. 352; 206 S.E.2d 458 (1974), *cert. den.*, 421 U.S. 929 (1975), and that case's analysis of *Kahn v. Shevin*, 415 U.S. 351 (1974), to conclude that alimony limited to women only was a constitutional means of cushioning the effect of spousal loss through divorce for that sex which feels the disproportionately heavy burden of that loss, 351 So.2d 904.

On May 24, 1977, the Supreme Court of Alabama granted Mr. Orr's Writ of Certiorari to the Court of Civil Appeals for review of that court's judgment but then, on November 10, 1977, quashed its Writ as improvidently granted without issuing a majority opinion. Three Justices of that court did, however, issue personal opinions. Justice Almon, joined by Justice Bloodworth, concurred specially taking the position that the challenged statutes "are designed to foster and preserve the family unit, a constitutionally permissible area for legislation," 351 So.2d at 906, while Justice Jones dissented after concluding that the classifications of the statutes lacked the necessary relationship to the purposes of the statutes

under the test of *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) and that in any event the object of the statutes, protecting the lone female, was in itself improper, 351 So.2d at 909.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, §1.

> No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code 1975, §§30-2-51 through 53.[1]

§30-2-51

> If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the conditions of his family.

§30-2-52

> If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard

[1] Formerly *Code of Alabama*, Title 34, §§31-33 (1940). Upon recodification these sections underwent certain minor, technical changes. These changes have no bearing on the issues presented by this appeal, however, and the order of the Supreme Court of Alabama was entered after recodification.

> being had to the condition of his family and to all the circumstances of the case.

§30-2-53

> If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

SUMMARY OF ARGUMENT

By awarding alimony to women only, Alabama's alimony statutes incorporate gross generalizations based on gender and allocate legal rights and responsibilities between Mr. and Ms. Orr according to their respective gender in an area of litigation where courts should be most sensitive. Neither the legislature nor the courts of Alabama have ever considered whether these generalizations have any basis in reality, but, instead, the statutes focus on gender solely as a result of "traditional notions" of the roles of men and women. Similarly, the statutes' historical origins and more recent judicial applications indicate that they are intended and applied to preserve these traditional roles. While the Court of Civil Appeals asserted in its opinion in this case that the statutes' purpose is to aid needy women such as Ms. Orr, the court gave no support for its assertion, other decisions indicate that need plays a very minor role in determining the amount of alimony awarded, and the record in the case does not indicate that the trial court ever investigated or made any findings regarding Ms. Orr's needs. Moreover, because the courts of Alabama must, as a matter of public policy, apply its alimony statutes for the benefit of women, Mr. Orr was effectively de-

prived of an impartial forum in which to adjudicate the financial issues raised by Ms. Orr's filing for divorce.

Consistent with the historical purpose of these alimony statutes, neither Ms. Orr nor any representative of Alabama has ever explained why men are excluded from their coverage. Mr. Orr is saddled with the alimony obligation which he contests in this action solely because of his status as a man who was formerly married to Ms. Orr. Because alimony is a direct obligation owed by *a person* rather than society or a class as a whole and because it is awarded without respect to any fault or wrongdoing on the part of that person, Alabama's exclusion of men from its protection but not its liability is particularly acute and unfair.

The immediate injury to Mr. Orr caused by these statutes is obvious: he suffers under a very substantial financial obligation and never had an opportunity to fairly adjudicate its propriety in an impartial forum. The discrimination of the statutes also cause more subtle but pervasive injury to all parties, however. By the statutes' application and enforcement, men and women in Alabama are trapped in the traditional gender roles which the statutes reflect. A man owing alimony is particularly constrained to act in the realms of economics and employment as Alabama feels a husband properly should. Then, too, their gender distinction represents Alabama's judgment of the capabilities and competency of women as a class whether the statutes are ever applied or not. In this regard, the distinction not only denigrates each woman's sense of her self and psychologically relegates her to her "proper place," but also disrupts the free and mature development of society.

ARGUMENT

I.

INTRODUCTION

Ms. Orr's divorce from Mr. Orr was a very personal and intimate event. The dissolution of a union of some years between two people is a traumatic and touching affair, the ultimate effects of which can not be measured by economic, sociological or psychological standards. This Court recognized these points and the particular legal significance of divorce in *Boddie v. Connecticut*, 401 U.S. 371 (1971), when it struck down Connecticut's requirement that petitioners for divorce must pay court and service costs as a condition precedent to having their petition heard. While the Court realized that the states had a great deal of latitude in protecting their courts from frivolous litigation, it held "that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." 401 U.S. at 374. In this appeal, Mr. Orr asserts that the same considerations apply under the Equal Protection Clause to require Alabama to deal fairly as between the parties to a divorce proceeding.

When Ms. Orr petitioned the Circuit Court of Lee County for a decree of divorce from Mr. Orr, she initiated an action in which the Alabama directly and decisively involved itself. "The State is a silent party to divorce actions, public policy is involved and the integrity of the court's decrees are involved," *Winston v. Winston*, 279 Ala. 534, 538, 188 So.2d 264, 267 (1966), concern-

ing an effort to set aside a divorce granted some years later. Of course, the particular policy of which Mr. Orr complains is that which is incorporated into Alabama's alimony statutes, Code of Alabama 1975 §§30-2-51, 52 and 53. Without examining the precise content and historical antecedents of this policy at present, Mr. Orr asserts that through these statutes, the State undeniably discriminates along gender lines; regardless of fault women may always be awarded alimony, but men can never be. If a reading of these statutes does not make this point clear, the cases decided pursuant to them surely do. In *Davis v. Davis*, 279 Ala. 643, 180 So.2d 158 (1966), the Supreme Court of Alabama reviewed a divorce decree awarding the husband custody of the parties' minor child and use of the parties' house in Gadsden, Alabama, as a home for him and the child. The court reversed the award as to the house stating, "[i]n effect, the wife, to the extent of her one-half interest in the Gadsden property, is being required to contribute toward the maintenance and support of her husband . . . In the absence of a statute so providing, there is no authority in the State for awarding alimony against the wife in favor of the husband. [citations omitted] There is no statute authorizing such award. The statutory scheme is to award alimony only in favor of the wife." 279 Ala. at 644, 189 So.2d at 159, 160. As recently as 1973, the Court of Civil Appeals of Alabama reaffirmed this position in *Grant v. Grant*, 49 Ala.App. 559, 274, So.2d 339 (Civ.App. 1973).

In short then, the State of Alabama intruded into the divorce proceedings of Mr. and Ms. Orr and, based upon the sex of the parties, allocated to Ms. Orr a right or potential benefit which was not accorded Mr. Orr. Moreover, this intrusion was into the sort of a proceeding which this Court has recognized as particularly sensitive and requiring the highest degree of respect for the parties

as persons. As will be shown, however, the State's allocation of alimony rights treated the parties as representatives of out-moded sexual stereotpyes. By its intrusion, Alabama captured the parties at their most vulnerable moment psychologically, reinforced these stereotypes and ultimately reinforced the sex roles incorporated in these stereotypes by an actual award and enforcement of alimony.

II.

ALABAMA'S ALLOWANCE OF ALIMONY ONLY TO WOMEN AND THE JUDICIAL CONCERNS WHICH THE STATE ASSERTS IN THE IMPLEMENTATION OF ITS ALIMONY STATUTES ARE BASED ON ARCHAIC NOTIONS AND GENDER ROLES RATHER THAN ANY GROUND OF DIFFERENCE BETWEEN MEN AND WOMEN.

The alimony statutes underlying the Circuit Court of Lee County's charge of alimony to Mr. Orr were premised on the consideration that Ms. Orr, as a woman, could not support herself: but for alimony a woman might become a ward of the State so the State solicitously protects her, again as a woman, from having to economically fend for herself. "The basis for these statutes is the common-law obligation of a husband to support his wife." *Davis*, 279 Ala. at 644, 189 So.2d at 160. "The duty to pay alimony is because of the duty of a man to support his wife," *Sims v. Sims*, 253 Ala. 307, 311, 45 So.2d 25, 29 (1950), reversing a lower court's modification of an alimony award for insufficient evidence of a change in the parties' circumstances. Alabama has further defined this common-law obligation of support as both a public and a private duty. *Ortman v. Ortman*, 203 Ala. 167, 82 So. 417 (1919), was a review of an award of temporary and permanent alimony. In its review, the Court also analyzed the foundations of the support duty

underlying the award and said: "[a] man owes a duty of such maintenance to his family as well as the State; not only that he keep them from becoming a charge on the body politic [citations omitted], but properly to maintain them, having regard to their established conditions in life and the circumstances materially affecting their lives and pursuit of happiness as citizens." 203 Ala. at 167, 168, 82 So. at 417, 418.

This support duty upon which Alabama relies to explain its alimony statutes is rooted in a centuries old perception of the proper social and moral place for men and women.

> [T]hese rules acquire much of their force and vitality from the fact that they construct a model of correct behavior. They are moral precepts. . . .
>
> They describe the traditional roles of husband and wife. The husband is to provide the family with food, clothing, shelter and as many of the amenities of life as he can manage, either (in earlier days) by management of his estates or (more recently) by working for his wages. The wife is to be mistress of the household, maintaining the home with the resources furnished by husband, and caring for the children. A reading of the contemporary judicial opinions leaves the impression that these rules have not changed over the last two hundred years, in spite of the changes in the legal position of the married women carried through in the Nineteenth Century and in her social and economic position in this century [citation omitted]. One can only account for the tenacity of these rules on the theory that since they express moral precepts backed up by religious teachings they are independent of time, place and circumstances.

H.H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §6.1 at 181, 182 (1968). See

also, B. Brown, A. Freedman, H. Katz and A. Price, WOMEN'S RIGHTS AND THE LAW (1971) at 128, 129, and S. de Beauvoir, THE SECOND SEX (Modern Library ed. 1968) at 426, 427. Although the statute's themselves and subsequent legislative action concerning them have not altered their purpose of protecting traditional gender role models, the Court of Civil Appeals of Alabama did try to sanitize this purpose in its decision in this case by noting: "It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed." Ala.Civ.App., 351 So.2d at 905. Apparently the Court of Civil Appeals concluded its equal protection research with *Kahn v. Shevin*, 416 U.S. 351 (1971), and felt this after the fact delineation of purpose without any documentation would save the statutes.

Kahn upheld a Florida statute which gave a $500.00 property tax to widows, but not to widowers, and in its opinion the Court accepted the Supreme Court of Florida's finding that the statutes object was to reduce "the disparity between the economic capabilities of a man and a woman:" 416 U.S. at 352. In cases decided subsequent to *Kahn*, however, the Court has refused to accept a simple assertion of any particular purpose and has delineated how far Ms. Orr must go to establish the purpose of Alabama's alimony statutes as aiding needy women after divorce. In *Weinberger v. Wiesenfeld*, 420 U.S. 436 (1975) the federal government argued that its payment of higher "Mothers' " social security benefits to to widow than to a widower was in an effort to compensate her for the employment discrimination which she would presumably face upon entering the market place. This Court emphasized that it must look for itself to find the true purpose of the distinction drawn between men and women, found the true "pur-

pose" to be Congress's assumption that widows, but not widowers, would stay at home to raise their children rather than enter the job market, and held the distinction unconstitutional. Similarly, *Califano v. Goldfarb*, 430 U.S. 199 (1977), was a challenge to the government's requirement of proof of dependency by a widower, but not a widow, before he could receive Old-Age, Survivors and Disability Insurance benefits with respect to his deceased wife's earnings. The government argued that the requirement reflected a conscious tailoring of the standards of eligibility by reasoning that the benefits were generally paid only on the basis of need but in view of the employment discrimination which women faced it could fairly assume that all women were needy as compared to men who had not been dependent on their wives. Again the Court looked behind the asserted purpose. Since the provision in question was phrased in terms of dependency rather than need, since the benefits were paid as insurance to replace lost wages, and since the legislative history of the Social Security Act showed these benefits were extended to men to equalize the benefits accorded insured men and women wage earners, the Court held that the discrimination was not constitutionally justified.

Contrasted with *Wiesenfeld* and *Goldfarb* is *Califano v. Webster*, 430 U.S. 313 (1977), where the Court upheld different methods of computing social security retirement benefits for men and women after finding that: "the legislative history is clear that the differing treatment of men and women . . . was not the accidental by-product of a traditional way of thinking about females [citations omitted], but rather was deliberately enacted to compensate for particular economic injuries suffered by women." 430 U.S. at 320. Similarly, the Court accepted the government's contention that different time

regulations governing discharge of men and women naval officers were intended to provide for more equal career treatment after finding that "the differing treatment of men and women naval officers . . . reflects not archaic and overbroad generalizations, but instead the *demonstrable* (emphasis added) fact that male and female line officers are not similarly situated with respect to opportunities for professional service." *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

On their faces, the challenged statutes are not cast in terms of aiding needy widows. All three statutes left the determination of an award and its amount to Ms. Orr to the discretion of the Circuit Court of Lee County and §§30-2-51 and 52 particularly required the judge to take the size of Mr. Orr's estate into account in determining the size of the award. Further, these sections' references to the "conditions of his family" did not direct the court to investigate Ms. Orr's needs, but to her sex, health, station in life and the duration of her marriage among other things, *Shirley v. Shirley*, Ala.Civ.App., 350 So.2d 1041 (1977), *cert. quashed*, Ala., 350 So.2d 1045 (1977), increasing a trial court's award for equitable reasons. Sections 30-2-52 and 53 also directed the court to regulate its award of alimony by reference to any misconduct of either party if the divorce had been granted on that ground. Considering the assertion of the Court of Civil Appeals, if Ms. Orr had been guilty of misconduct she apparently would have been less needy than if not; conversely, if Mr. Orr had been guilty of misconduct, then Ms. Orr would necessarily have been more needy as a result of his transgressions. Further, even in a divorce not grounded on misconduct of one of the spouses, "the trial court may consider the conduct of the parties" in determining an award of alimony. *Shirley*. Leaving the statutes' faces, no original or subsequent legislative his-

tory provides any support for the position of the Court of Civil Appeals, but cases in which alimony has been awarded reflect the relatively minor role which need plays in determining the size of the award.

The analysis of the Court of Civil Appeals in *Shirley* is a good example of the ad hoc approach of the courts in fixing an alimony award and of the incidental relevance of the wife's needs.

> It is clear that the distinguished trial judge, in the matter now before this court, relied heavily on the aspect of the wife's conduct. It is equally clear that there is ample evidence that her conduct in large measure caused the marriage to fail. However, the fact *[sic]* remains that the parties were married for 10 years, the wife having married the husband when she was 16 years old; that the wife during this time performed normal household duties; that she was a good mother; that she has no marketable skill; that she has only a high school education; that she had some slight psychiatric or emotional problem.
>
> On the other hand, the husband is a properous, industrious young business man. His income is over $100,000 a year; he has $171,000 in savings; he has real property with a value exceeding the indebtedness thereon of approximately $80,000; his health is apparently good; his prospects in life are good.
>
> As noted earlier, the wife and child received $600 per month total as alimony and child support. Additionally, the wife was awarded the homeplace, but apparently is responsible for the mortgage payments of approximately $200 per month. She also received certain personal property and certain specific medical care.
>
> Considering all of the above, we find that the learned and distinguished trial judge did abuse his discretion and that the award to the wife and the award of child support is contrary to law and equity.

Ala.Civ.App., 350 So.2d at 1044. Thus, while the court noted attributes of Ms. Shirley which indicated need on her part—her lack of education and a marketable skill and her emotional problem—the court did not investigate the financial extent of this need but focused on her lengthy performance of her "normal household duties," on her characteristics as a mother and on her husband's estate.

The statement of the Court of Civil Appeals notwithstanding, Alabama's alimony statutes are not for the protection of needy women after divorce. Their legislative origins reflect nothing more than an incorporation and extension of the common law duty of a man to support his wife, and the awards made pursuant to them establish that the same concerns govern their application today. As a "silent party" in Mr. and Ms. Orr's divorce proceeding Alabama injected its public policy considerations founded on centuries old notions of womanhood into the sensitive and intimate affairs of the parties. The qualitative nature of this intrusion and the classifications controlling it are in direct opposition to the philosophy of the Equal Protection Clause. The protection of that clause extends to "persons", and a state can not avoid its application by relying on gross generalizations concerning aggregate groups. Moreover, the generalizations behind Alabama's alimony statutes are not even close to being accurate today. According to the 1970 census, women comprised approximately 38% of Alabama's civilian labor force, and 61.6% of those women were married with a husband present. U.S. Bureau of the Census, COUNTY AND CITY DATA BOOK, 1972 (1973), p. 32. In *Taylor v. Louisiana*, 419 U.S. 522, 535n.17 (1975), this Court reviewed simi-

lar figures on women's employment across the country and, after noting that 51.2% of mothers whose husbands were present were in the work force, stated that these figures put to rest the notion that women serve a particular home related function. The practical reality that women, married or not, participate in worldly affairs in Alabama and across the country in such substantial numbers belies any practical foundation for Alabama's solicitous protection of them through its alimony laws. In *Taylor*, the Court held that the appellant's Sixth Amendment right to a jury drawn from a fair cross section of society was not affected by the "distinctive role in society" which women have traditionally served so as to allow all women an absolute exemption from jury service. Of course Mr. Orr does not assert a Sixth Amendment right to counter balance Alabama's gender classification, but he is suffering an immediate burden demonstrably based on that classification – an alimony obligation in excess of $1,600.00 per month – and *Taylor* stands for the proposition that Alabama's protection of Ms. Orr's "role in society" is not in and of itself an important governmental objective. In this context Alabama's intrusion into the sensitive areas of marriage and divorce is all the more gross and arbitrary.

III.

THE GENDER DISTINCTION DRAWN IN ALABAMA'S ALIMONY STATUTES DOES NOT SERVE ANY IMPORTANT OR LEGITIMATE GOVERNMENTAL OBJECTIVE.

The historical origins and purpose of the challenged statutes have already been presented to the Court. Patently Alabama's historical objective of extending a husband's support obligation after divorce is not a

legitimate, much less important, governmental objective. The thrust of every gender discrimination decision rendered by this Court is to the effect that neither a state nor national government can rely on "archaic and overbroad generalizations," *Schlesinger*, 419 U.S. at 508, about the sexes to allocate their benefits and burdens. A fortiori, then, Alabama can not allocate its benefits and burdens to perpetuate the stereotypes encompassed in those generalizations, and the state certainly can not structure personal responsibilities between its citizens to perpetuate those stereotypes.

In *Stanton v. Stanton*, 421 U.S. 7 (1971), this Court held Utah's statutory scheme which provided for different ages of majority for males – age 21 – and females – age 18 – unconstitutional in the context of child support. The mother and father of a boy and girl were divorced, and under their divorce agreement the father was obligated to pay support with respect to each child until he or she reached majority. When the girl reached 18, her father quit paying support with respect to her, and her mother sued him claiming that the different ages of majority discriminated against her and her daughter on the basis of her daughter's sex. The Supreme Court of Utah justified and upheld the discriminatory age of majority differential by reference to the "old notion" that men generally have the responsibility of being a provider for their families so they need support over a longer period of time than women to prepare for their provider role. *Stanton v. Stanton*, 30 Utah 2d 315, 517 p.2d 1010 (1974). This Court reversed that decision stating that the traditional male/female role models are not longer functional and could not justify the father's different responsibilities since "[a] child, male or female, is still a child" for the purpose of support laws. 421 U.S.

at 414. To the same extent that Utah could not determine the responsibility of a parent to his or her child by reference to the sex of the child, Alabama can not determine the obligations of Mr. Orr to Ms. Orr by reference to their sexes.

Similarly, neither Ms. Orr nor the Courts of Alabama have indicated any purpose which the gender classifications of the statutes, as opposed to the statutes themselves, may serve. The Court of Civil Appeals apparently assumed that *Kahn*, 416 U.S. 351, established that classifications benefitting women but not men are by definition for a proper purpose. Thus, in his concurrence joined by Justice Bloodworth, Justice Almon of the Supreme Court of Alabama expressed his dissatisfaction with an earlier decision of the court and said "It appears, when viewed in isolation, that statutes which restrict the rights of women are unconstitutional. On the other hand statutes which grant women rights which men do not possess are not unconstitutional." Ala., 351 So.2d at 906. This conclusion is unsupportable however. Just recently in *Regents of the University of California v Bakke*, 46 U.S.L.W. 4896 (1978), a majority of the court held in one form or another that the University could constitutionally operate an affirmative action plan facilitating qualified Black students' entrance into one of its medical schools. In his opinion announcing the judgment of the Court, Justice Powell emphasized that a racial classification without regard to some external justification was facially invalid: "[p]referring members of one group for no other reason than race or ethnic origin is discrimination for its own sake. This the constitution forbids." 46 U.S.L.W. at 4906. Since gender classifications are within the prohibitions of the Equal Protection Clause, Justice Powell's conclusion applies in this case to invalidate Alabama's

alimony statutes absent some principle external to them justifying their classification.

In any event, however, the Court of Appeal's understanding of *Kahn* is faulty. In *Kahn* this Court was properly deferential towards the manner in which Florida implemented its policy of aiding women. In upholding the tax exemption the Court noted that the statute's discrimination not only made Florida's administration of the law more convenient, but also that with regard to equal protection " 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " 416 U.S. at 355, quoting from *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973). Because of these factors, the gross gender classification was a legitimate means by which Florida could implement the statute's purpose. In essence the Court held that the leeway given states in formulating their tax programs excused much of the Florida's burden of establishing a particular rationale for its discrimination so that the administrative convenience resulting from the statute's absolute exclusion of men was a sufficient justification even though it would not have been otherwise. Alabama did not even gain any administrative convenience by limiting a right to alimony to Ms. Orr, however. All of its alimony statutes required the Circuit Court of Lee County to make some sort of an investigation, since it had to exercise its discretion, and to pay particular regard to the estate of Mr. Orr. Consequently no further burden would have been placed on the court by considering giving alimony to Mr. Orr. Further, the award of alimony to Ms. Orr and its enforcement was not an exercise of state largesse comparable to a tax exemption. Ms. Orr did not simply get a benefit which was denied to Mr. Orr, but Mr. Orr was personally

burdened with conferring that benefit which greatly exceeds $500.00. The tax exemption considered in *Kahn* was treated by the Court as a manner in which the state, as a society, could preliminarily redress some of the economic discrimination which the society would soon direct at the widow as a woman, but the alimony award to Ms. Orr was not society's burden and was not meant simply to facilitate Ms. Orr's entry into the male dominated job market. The award was intended to avoid any loss to Ms. Orr at all of Mr. Orr's support as a financing spouse.

Further, those cases noted earlier concerning the purpose of statutes which classify along gender lines also apply to this case with regard to the degree to which the objective of the discrimination must be shown. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court struck down Oklahoma's age differential between men and women for the legal purchase of certain beers. Oklahoma argued that because its arrest records showed twice as many young men arrested for alchohol related traffic violations than young women, the state was justified in requiring men to wait until age 21 to buy 3.2% beer while allowing women to buy it at age 18. Without considering the particular standards of review articulated by the various justices in their opinions, the decision itself established that a cursory statistical generalization as presented in *Kahn* will no longer satisfy the equal protection test quoted from *Reed v. Reed*, 404 U.S. 71, 76 (1971), and *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920) and applied in *Kahn*, 416 U. S. *at* 355: that the discrimination between men and women "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." In short, whether this Court now takes a "middle-tier" approach to gender discrimination cases or only applies

the "rational basis" test with more scrutiny, see *Craig*, 429 U.S. at 210n.* (Powell, J., concurring), the deference traditionally accorded a system of classification under the "rational basis" test is no longer as extensive in gender discrimination cases as it was when *Kahn* was decided.

While the Court was willing in *Craig*, 429 U.S. 190, to "accept for the purpose of discussion the District Court's identification of the objective underlying" the discriminatory statutes, that acceptance was in the context of the statutes' ultimate invalidity, and concerning the present case a comparison of *Schlesinger*, 419 U.S. 498, and *Webster*, 430 U.S. 313, to *Wiesenfeld*, 420 U.S. 636, and *Goldfarb*, 430 U.S. 199, establishes that the Court will not normally accept a mere assertion of benign intent as a justification. In *Schlesinger* the discrimination was drawn with reference to the "demonstrable fact" that men and women naval officers were not similarly situated with reference to professional opportunities, 419 U.S. at 508, and in *Webster* the discrimination was drawn with reference to actual employment inequities the existence of which particularly noted in the debate in the House of Representatives concerning the challenged statute. In contrast to these cases, neither Ms. Orr nor the courts of Alabama have specified any particular evidence that women are more needy upon divorce than men. Rather they have relied on *Kahn's* evaluation of the economic status of women, which was based on figures taken 8 years ago, and have not considered the possible effect of the Equal Pay Act of 1963, 29 U.S.C. §206(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), or any other legislation meant to standardize employment opportunities and benefits for men and women.

Ms. Orr can not present the Court with an important governmental objective justifying the discrimination of Alabama's alimony statutes because none exists. Rationally Alabama has no reason to exclude men from the class of potentially needy spouses upon divorce, and their exclusion does not practically benefit the state in any way. Alabama's alimony statutes are an example of a traditional classification being used "without pausing to consider its justification.... Habit rather than analysis [made] it seem acceptable and natural to distinguish between male and female," *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting), upholding a requirement that illegitimate children prove dependency on their deceased father prior to receiving social security benefits with respect to his death.

IV.

THE CLASSIFICATIONS DRAWN IN ALABAMA'S ALIMONY STATUTES ARE NOT SUBSTANTIALLY RELATED TO THEIR OBJECTIVES AND DO NOT HAVE A FAIR AND SUBSTANTIAL RELATION TO THE STATUTES' OBJECTIVES.

Although the statutes' historical purpose of extending the common law duty of a man to support his wife is served by Alabama's requiring only men to pay alimony, that purpose is not a legitimate object of legislation since, by definition, it decrees that all persons similarly situated will not be treated alike. In a like view, the statutes are not a fair way of implementing the purpose of protecting a needy spouse after divorce. If a needy husband is not given the same rights against his spouse as a needy wife, then the protection afforded them by Alabama's alimony statutes is neither fair nor equal.

To the extent that Alabama's alimony laws presume that a woman is not capable of dealing in worldly affairs,

they also irrevocably burden her husband with compensating for her incapabilities even after divorce. The State in effect arbitrarily conditions a man's participation in legal marriage and procreation, two fundamental rights, on his assumption of the burdens of his mate. Mr. Orr is burdened with alimony solely because of his status as a divorced man, and laws which allocate responsibility and economic burdens vis-a-vis two adults according to their respective statuses are simply not fair. Moreover,while the Court of Civil Appeals asserts that the purpose of the statute is to aid needy wives, the earlier discussion of *Shirley*, Ala.Civ.App., 350 So.2d 1041, reflects that the size of an alimony award is actually determined by reference to many other factors and the wife's need plays only a minor role. To the extent that Mr. Orr's $1,600.00 per month alimony obligation is founded on factors other than Ms. Orr's need, this obligation is neither fairly nor substantially related to the purpose of the statutes by which it is authorized.

Again, too, the cases decided by this Court since *Kahn*, 416 U.S. 351, indicate that statutes which are intended to benefit a particular class can do so only remedially and their remedy must be directly related to the inequity at which they are directed. Thus in *Schlesinger*, 419 U.S. 498, the Navy was justified in allowing women more time than men in which to receive a promotion before being discharged in view of the fact that the Navy's system of service did not allow women the same opportunities for advancement over the same period of time, and in *Webster*, 430 U.S. 313, women could be advantaged in calculating social security retirement benefits based on employment income since they had not been receiving salaries equal to men for comparable work. Neither Ms. Orr nor any court of Alabama has explained how awarding alimony to women only is particularly related to any

injury to women. Rather, because the alimony statutes assign general responsibilities based on status, they inherently avoid focusing on and articulating any particular problem or remedy. Similarly, by reliance on status and by maintaining the financial marriage, alimony in Alabama is not remedial, but regressive.

Kahn and *Schlesinger* involved efforts to ease a woman's entrance into a male dominated society, while *Webster* compensated a woman for the discrimination which she suffered as a participant in that society. These cases realized that the Equal Protection Clause was written to do away with legal status so that all people could rise or fall to their own level of success based on their own attributes but that sometimes distinctions must be drawn between the sexes to provide each man and woman an equal opportunity to rise or fall. Mr. Orr's alimony obligation, however, was not intended to help Ms. Orr enter the economic world but to support her so that she need not do so. Further, since Mr. Orr's obligation would presumably be modified if Ms. Orr were to accept employment and earn wages, the system of alimony motivates her to remain protected at home. Of course this point is not meant to argue any generalizations about women or the actual effects of Alabama's alimony program, but it does point out the incongruency between Alabama's alimony statutes and the statutes upheld in *Kahn, Schlesinger* and *Webster*.

These cases provide another useful comparison. As explained earlier, *Kahn*, 416 U.S. 351, held that a state may adjust its tax program to relieve some of its burden with respect to members of a class which is shown particularly to suffer ecomonic discrimination. Society lightened a widow's tax burden since it believed she would suffer a correlative burden with her entrance into its male dominated job market. This premise does not, however, compare to Alabama's laying of a personal burden on Mr. Orr as a particular member of a class without ever establishing some correlation of responsibility between him and Ms. Orr as the beneficiary of his burden. Without establishing this correlation, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Bakke*, 46 U.S.L.W. at 4906, 4907 (Powell, J.) The record in this case does not show that the Circuit Court of Lee County ever investigated or made any findings regarding Ms. Orr's actual needs or whether Mr. Orr was in any way responsible for her economic and commercial incapacity. Instead, by the Court of Civil Appeals' reliance on *Kahn*, Mr. Orr is apparently saddled with personal responsibility for protecting from injustices to which society, and necessarily not he, will submit her. Obviously this sort of liability is not substantially or practically related to any sort of proper governmental objective. Again quoting from Justice Powell in *Bakke*, 46 U.S.L.W. at 4907:

> 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of social discrimination. That is a step we have never approved.

V.

THE GENDER DISTINCTION DRAWN IN ALABAMA'S ALIMONY STATUTES INJURES MEN, WOMEN AND SOCIETY AS A WHOLE.

The immediate injury to Mr. Orr caused by these statutes is obviously his $1,600.00 per month alimony obligation. But for these statutes, he could not be charged with alimony under Alabama law. "[T]he jurisdiction and authority . . . to make allowances to the wife 'out of the estate of the husband,' temporary and permanent, is a statutory and limited jurisdiction," *Gabbert v. Gabbert*, 217 Ala. 599, 601, 117 So. 214, 215, 216 (1928), affirming a lower court's dismissal of a petition to modify an award of alimony on the grounds that the court did not retain jurisdiction over the matter. While a wife has the common law right to support from her husband, "[a] divorce without alimony cuts off the right. *Sims*, 235 Ala. at 311, 45 So.2d at 29. Thus, absent the authority of the challenged statutes Mr. Orr would have no alimony obligation at all.

The grant of the authority to award alimony also contains a charge to the court, however. *Ortman*, 203 Ala. 167, 82 So. 417, shows that the trial court's concern with alimony is public as well as private and its awards must protect the state from having to deal with divorced women as its wards. Similarly, in *Russell v. Russell*, 247 Ala. 284, 24 So. 2d 124, 126 (1946), the court instructed the lower court in dictum that a settlement agreement signed by the parties was not binding on the lower court but must be reviewed with regard to "whether the amount as stipulated is fair to the wife." Not only the gender classifications, then, but the whole scheme of Alabama's alimony law charged the Circuit Court of Lee County to protect Ms. Orr's interest at the expense of Mr. Orr and effectively deprived him of a

fair forum in which to resolve the financial issues raised when Ms. Orr petitioned for divorce. Just as a petitioner for divorce must be provided with a forum which will hear and act on his or her petition, *Boddie*, 401 U.S. 371, Mr. Orr had a right under the Equal Protection Clause to have the issues of his divorce settled without regard to the sex of the parties.

As a practical matter, the discriminatory classifications and impact of Alabama's alimony statutes also prevented Mr. Orr from equitably negotiating a property settlement agreement. In preliminary property settlement negotiations with Ms. Orr, Mr. Orr and his attorney were presumably aware of the thrust of these statutes and the wild card advantage which they would give Ms. Orr before the trial court. This derivative taint from the statutes' discrimination was not merely incidental to their application. Their purpose was to structure the continuing legal relations between a married couple along traditional gender models, and that purpose was fulfilled by virture of their derivative effect as much as if they had been enforced by the Circuit Court in those negotiations.

The manner in which these statutes were applied and their gender classifications also obviously affected Ms. Orr, and simply because their asserted purpose accrued to her financial benefit, they were not necessarily without harm to her. As Justice Powell noted in *Bakke*, "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." 46 U.S.L.W. 4896, 4904. As Mr. Orr has documented, Alabama's alimony system sets up just such a stereotypical program; Ms. Orr was eligible to receive alimony simply because the state assumed she, as a woman, was incapable of merely providing for herself. The Court

has noted the evils of this sort of stereotyping inumerable times when the discriminatory intent of a challenged statute or practice was directed against rather than in support of the typed class, but the injury to the person can be equally as great whether the statute or practice purports to help or hinder. In *Doing Good,* authorities from four disciplines discuss and analyze the various effects of legal paternalism. As a psychiatrist and psychoanalyst Dr. Williard Gaylin points out that a state must act to support the intrinically dependent who actually can not provide for themselves. He goes on to say however:

> The second group, the extrinsically dependent, are those I define as individuals made dependent by artifacts of our culture. They have the intrinsically capacity for nature and autonomous functioning, but because of social or economic roles are in positions where they are incapable of supporting themselves at the most fundamental level. This group would include the poor, certain of the elderly, women constricted by cultural definitions, and even more groups whose dependence seems so logical and inevitably part of their lives that we do not recognize it as an artifact. . . . It is an indignity for an adult who has no intrinsic needs for care and maintenance to be reduced to the level of a child - with all the concomitant humilitations - because of a social system that deprives him of the rites of passage into maturity.

W. Gaylin, I. Glasser, S. Marcus and D. Rothman, DOING GOOD (1978) at 29, 30. While the effect of this humiliation to women caused by the discrimination of Alabama's alimony laws can not be easily identified or quantified in particular, it is none the less very real, and this Court should note it.

Similarly, to the extent that the challenged statutes regulate human relations, society as a whole suffers. In *The Second Sex,* Simone de Beauvoir chronicles at length the injury, realized or not, to all of us caused by "separate but equal" treatment of the sexes and concludes that only by the cessation of this treatment can men and women begin to fully enjoy their relations with one another as full and complete people. While this Court is certainly not a council implementing sociological propositions, de Beauvoir's analysis is pertinent. The Equal Protection Clause was written to insure the protection of certain rights so that all people will be accorded the dignity which they deserve. The framers of the Fourteenth Amendment intended to affect society and direct its organization to protect the freedom of each of its members. But this goal was not meant to be an end in itself; it was part of an effort to make this nation a qualitatively better place for each of us to live. To the extent that the principles and stereotypes embodied in Alabama's alimony statutes undermine this effort, the statutes are in opposition to the spirit, as well as legal content, of the Equal Protection Clause.

CONCLUSION

For the reasons stated, Alabama's alimony statutes deny equal protection of the law to each person subject to their application and should be declared unconstitutional.

Respectfully submitted,

JOHN L. CAPELL, III
CLINTON B. SMITH

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

A statute which confers an economic preference on women is constitutional, but a statute which economically prefers men, or prefers either sex for non-economic reasons, is unconstitutional. The Alabama Alimony Law economically prefers women, and is constitutional.

Statutes economically preferring women are constitutional if their purpose is to reduce the disparity in economic condition between men and women caused by the long history of discrimination against women.

The Alabama Alimony Law does not penalize women, and it was enacted as compensation for past discrimination.

ARGUMENT

I

THE ALABAMA ALIMONY LAW CONFERS AN ECONOMIC PREFERENCE ON WOMEN AS COMPENSATION FOR PAST DISCRIMINATION.

The Alabama Alimony Statutes[1] unquestionably prefer women. Only the divorced wife, under Alabama law, may apply for and receive alimony.[2] The question presented by this case is whether the preference in favor of women afforded by these statutes is constitutionally permissible. Ms. Orr maintains that the statutes are constitutional.

Prior to 1971, legislative classifications by gender were consistently and routinely upheld by this Court.[3] Since 1971 this Court has taken a different approach in cases involving statutes with classifications on the basis of gender. A review of recent cases will indicate that a clearly defined rule pertaining to gender classification statutes has evolved.

This is the rule: A statute which conferes an economic preference on women is constiutional, but a statute which economically prefers men, or prefers either sex for non-economic reasons, is unconstitutional. The

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[1] *Code of Ala.*, 1975, Sections 30-2-51 through 30-2-53. These statutes formerly appeared in the *Code of Ala.* as Title 34, Sections 31-33 (1940) (Recomp. 1958).

[2] *Davis v. Davis*, 279 Ala. 643, 180 So.2d 158 (1966).

[3] See for example: *Muller v. Oregon*, 208 U.S. 412 (1908); *Goesaert v. Cleary*, 335 U.S. 464 (1948); and *Hoyt v. Florida*, 368 U.S. 57 (1961).

Alabama Alimony Statutes economically prefer women, and they are, therefore, constitutional.

The application of this rule is best demonstrated by a comparison of two cases decided by this Court in March of 1977.[4] Part of the Social Security Act which economically discriminated against women was held unconstitutional on March 2, 1977, in *Califano v. Goldfarb*. Nineteen days later in *Califano v. Webster* a portion of the Social Security Act which economically discriminated in favor of women was held constitutional.

At issue in *Goldfarb* was a federal statute which provided certain benefits for widows which were not available to widowers. The Court reasoned, as it had in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), that the statute operates to deprive working women of the protection for their families which a similarly situated male worker would have received. Such a gender-based distinction penalizes the efforts of female workers, and is unconstitutional.

The statute challenged in *Webster* rewarded, rather than penalized, female workers, and it was held to be constitutional. That statute provided for higher old-age benefits for a retired female wage earner than for a retired male wage earner. The Court viewed this law as compensatory legislation designed to serve the important governmental objective of reducing the disparity in economic condition between men and women caused by a long history of economic discrimination against women.

The only difference in the statutes considered in *Goldfarb* and *Webster* was that one economically preferred women, and the other economically preferred

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[4] *Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Califano v. Webster*, 430 U.S. 313 (1977).

men. The rule favoring economic preferences for women, described above, was applied, and the *Goldfarb* statute failed because it economically preferred men, while the *Webster* statute passed because it economically preferred women.

Goldfarb and *Webster,* because of their proximity in time, serve as a dramatic illustration of this Court's application of the rule allowing legislation to economically favor women, and they are entirely consistent with the decisions of this Court in cases involving gender-based classification statutes beginning in 1971 with *Reed v. Reed,* 404 U.S. 71 (1971). A careful analysis of the post 1971 sex discrimination cases should have made the results reached in *Goldfarb* and *Webster* a foregone conclusion. A similar analysis of these decisions should be conclusive in this case. A summation of the cases appears below.

In *Reed v. Reed* an Idaho statute gave preference to men over women in serving as administrators of estates, and it was invalidated as being violative of the Equal Protection Clause.

In 1973 the Court held unconstitutional a Federal statute which granted fringe benefits to servicemen that were withheld from service women in *Frontiero v. Richardson,* 411 U.S. 677 (1973).

A Florida statute granting a tax exemption to widows, and not widowers, was upheld in *Kahn v. Shevin,* 416 U.S. 351 (1974), since it economically preferred women, and the Court noted that such a preference was justified because a history of economic discrimination against women placed the lone woman in a disadvantaged position.

Early in 1975 this Court approved a Federal statute which provided for special treatment of female naval officers in *Schlesinger v. Ballard,* 419 U.S. 498 (1975).

A week after *Ballard* the Court struck down a Louisiana statute in *Taylor v. Louisiana,* 419 U.S. 522 (1975), which was said to be unconstitutional because it discriminated against women litigants by making jury services optional for women and mandatory for men.

In the Spring of 1975 the Court decided that a portion of the Social Security Act was unconstitutional because it allowed men to earn benefits for their survivors, without allowing women the same right, in *Weinberger v. Wiesenfeld.*[5]

Stanton v. Stanton, 421 U.S. 7 (1975), was the final 1975 case involving economic discrimination based on gender, and there a male preference statute which required parental support for men to age 21 and women to age 18 was held unconstitutional.

In summary: Men preference statutes were held unconstitutional in *Reed, Frontiero, Taylor, Stanton,* and *Goldfarb;* and women preference statutes were held constitutional in *Kahn, Schlesinger, Wiesenfeld,* and *Webster.* In every case the statutes economically favoring females have been approved, and the statutes economically favoring males have been disapproved.

Mr. Orr has cited the cases of *Stanley v. Illinois,* 405 U.S. 645 (1972), and *Craig v. Bowen,* 429 U.S. 190 (1976), as examples of cases in which female preference statutes were held unconstitutional. These cases are inapplicable to the issues here presented because the purpose of the statutes under consideration in those cases was not to confer an *economic* preference on women.

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[5] See discussion of *Califano v. Goldfarb, supra.*

The statute in *Stanley* favored females in child custody proceedings, and the statute in *Craig* favored females in the purchase of alcoholic beverages. The principles established by *Kahn, Schlesinger, Wiesenfeld,* and *Webster* only apply to statutes conferring an economic benefit on women so as to make up for the disparity created by the history of economic discrimination against women. The statutes involved in *Stanley* and *Craig* could not be construed to be for the purpose of relieving economic disparity, and they were therefore held to be unconstitutional.

Justice Douglas, writing for the majority, explained why statutes conferring an economic benefit on women are constitutional in *Kahn v. Shevin.* He noted statistics revealing that between 1955 and 1972 the median earnings for women were little more than half the median earnings for men,[6] and in 1970 while 73.9% of working women earned less than $7,000.00, 70% of working men were earning more than $7,000.00.[7] On the basis of the available data it was concluded that there is a disparity between the conomic capabilities of a man and a woman. Legislation designed to cushion the financial impact of spousal loss upon a widow is a legitimate governmental objective because:

> "The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer."

[6] *Kahn v. Shevin, supra,* n. 5.

[7] *Id.* n. 4.

The divorcee finds herself just as economically disadvantaged as the widow, so Justice Douglas' comments regarding the acuteness of the problem faced by the widow apply with equal force to the divorcee's situation. Therefore, legislation designed to alleviate the problem encountered by the divorcee is constitutional.

In its *Per Curiam* opinion in *Califano v. Webster* this Court noted that classifications by gender must serve important governmental objectives, and cited *Kahn* for the proposition that:

> "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective."

II

APPELLANT'S POSITION

In *Webster* the Court recognized two instances in which gender classifications allegedly having a benign, compensatory purpose cannot be justified: (1) if the legislation in fact penalizes women wage earners; or (2) if the statutory structure and its legislative history reveal that the classification was not designed as compensation for past discrimination. The thrust of Mr. Orr's argument is that the Alabama Alimony Law in fact penalizes women, and was not designed to compensate for past discrimination. These two facets of Mr. Orr's argument will be analyzed below.

A. Penalty

The Alabama Alimony Law penalizes women, according to Mr. Orr, because it motivates the divorced wife to remain protected at home.[8] *Amicus* says that the law

[8] Appellant's brief, p. 24.

steers the husband into the business world, and the wife into the home, thereby discouraging the divorced wife from achieving economic independence.[9]

Mr. Orr and *Amicus* have the idea that women will not work because they might be able to require their husbands to support them after divorce.

There is no factual basis for the assertion that the prospect of alimony encourages a divorced wife to stay at home. In fact, divorce appears to motivate the woman to enter the business world. Bureau of Labor Statistics for March of 1976 show that 71.4% of the divorced women participate in the labor force, as compared with all women who have a participation rate in the labor force of 46.8%.

Aside from the factual invalidity of Mr. Orr's argument that the alimony system keeps women out of the job market, it has no basis in reason. It is no more reasonable to suppose that a women will get out of the job market because of the prospect of receiving alimony, than it is to speculate that a man will get out of the job market because of the prospect of having to pay alimony.

Mr. Orr's argument is self defeating. If the Alabama Alimony Law were changed so that the trial court could award alimony to either party, it would still be the divorced wife, in the great majority of the cases, who would be the recipient of the alimony. This is so because need is an important consideration in awarding alimony:

> "It is proper to consider the wife's income or other means of support; the joint labor and capacity for work of the husband and wife; their joint income; sources from which the common property came; whether there are children to support; the nature,

[9] *Amicus Curiae* brief p. 27.

> expense and clearness of proof of the husband's delictum; the ability of each to earn money; the husband's condition in life, health, and needs; and the ages of the parties."[10]

Women are more likely to be in need at time of divorce than men. Bureau of the Census figures for 1974 show that the median earnings of women were only 57.2% of men's median earnings, so we can reasonably assume that in the event of divorce the wife would most often be the one to be awarded alimony. Since the wife would continue to be the major recipient of the alimony, even if the statute were chaned as suggested by Mr. Orr, the motivational impact of alimony would remain the same as it is under the present Alabama law.

Regardless of motivations there is no problem with women entering the labor force and seeking economic security. This Court recognized in *Stanton v. Stanton* that the trend is toward an expansion of women's roles:

> "No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice."

The problem is not that women are staying out of the job market, but that past discrimination has made them less equal to the task than men, and they are treated unfairly when they get there. Professor Amundsen has described the economic plight of the woman:

[10] *Frazier v. Frazier*, 273 Ala. 53, 134 So.2d 205 (1961).

"Median incomes among all families headed by women (in 1969) was no more than $4,000.00—that is, about one-third the median income of husband-wife families in the same year. And, in most families in which the woman head worked, the level of family income was determined by her earnings. The myth of American women living high on widow's pensions, alimony payments, or child support is effectively exploded by the following figures: The median contribution to family income of women who were family heads was 72% in 1968. What this means is that less than 30% of the meager income enjoyed by these 5.6 million single women with children or other family members to support came from the late husband, the ex-husband, the father, or any other source.

Even more sobering is the discovery that, of the women struggling to support a family without the help of a husband, 2.4 million live in poverty with the 4.5 million children who are their sole responsibility. (We use here a definition of poverty which is conservative in the eyes of many critics—an income of $3,535.00 for an urban family of four, as of 1968). Three out of every five children in families headed by women are poor. In fact, if we accept the economists' figure of $4,855.00 as designation of the 'near-poor' urban family in 1969, we find that this is *above* the median income among all families headed by women.

The implications of these findings should be clear. An American women today has to face up to the very real possibility that she may live part or most of her adult life alone. Her chances in that regard are one out of three or four. If she is a widow, the chances of her having to take up work is roughly one out of three, and if she is divorced, two out of three. She is almost more likely to have children to support in her single state; 77% of the working divorcee and 40% of the working widows had children under 17 in 1969.[11]

Based on the statistical information noted above, and careful analysis, there is no justification for Mr. Orr's assumption that the alimony system in Alabama traps men andwomen in traditional gender roles. This alimony system has no effect on roles undertaken by men and women. It does make a small concession to the women by attempting to make up for her economic dependence.

B. Statutory Structure and Legislative History

Mr. Orr argues that the Alabama Alimony Law, as revealed by its structure and history, was not enacted as compensation for past discrimination because it is based on the common law obligation of a husband to support his wife. It is true that *Webster* requires that statutes favoring one sex be enacted as compensation for past discrimination in order to pass judicial scrutiny, and it is true that the Alabama Alimony Law is based on the common law obligation of a husband to support his wife. However, it is not true that the common law required the husband to support his wife for reasons other than compensation.

Mr. Orr says that the common law obligation of support was based on archaic paternalistic and romantic notions of the inferiority of women and their place in society. What Mr. Orr overlooks is that fact that the support obligation was imposed by the common law to compensate the wife for the discrimination she suffered at the hands of the common law.

The common law stripped the married woman of many of her rights and most of her property, but it

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[11] Amundsen, *The Silenced Majority*, 27-28 (1971).

attempted to partially compensate by giving her the assurance that she would be supported by her husband.

It is not difficult to find authorities supporting the position that the wife was deprived at common law. The wife's status as a nonentity was described by the Alabama Supreme Court in *Strouse v. Leipf,* 101 Ala. 433, 14 So. 667 (1893):

> "The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own * * * The husband has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her.
>
> * * *
>
> The doctrine of the common law is, that by marriage the husband and wife become one person in law; that she is under his protection, influence, power and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term *coverture.*" (emphasis supplied)

Since the common law required the wife to subordinate herself to her husband, and give up rights she held as a single person, it obligated the husband to compensate her for these discriminations. The Court of Appeals of Alabama acknowledged the compensatroy function of the support obligation in *Joyner v. McMurphy,* 26 Ala. App. 549, 163 So. 533 (1935):

> "In this state, subject to certain statutory changes, not here involved, the common law rule obtains. Here, the husband is the head of the household, and as such has certain liabilities, and, except where they have been limited by a statute, the husband has all the rights to which he is entitled under the common law. * * * The husband furnishes the name, the domicile, and generally the support and maintenance of the family according to the station in life in which they live, * * * *In return for this support,* the husband is entitled to the wife's services in all those domestic affairs which pertain to the comfort, care, and well being of the family. Her labor is her contribution to the family support and care. * * * When boarders were taken into the home, in the absence of a special contract to the contrary, the amount due for board was payable to the husband as the head of the household, and the right to sue was in him." (emphasis supplied)

The Alimony Law continues the common law support obligation of the husband after divorce. Because the common law support obligation was compensatory, the Alimony Law is likewise compensatory. Since the Alimony Law was designed and enacted to compensate women for past discriminations it complies with the requirement of *Webster* that the structure and history of the legislation reveal that the classification was designed as a compensation for past discrimination.

CONCLUSION

The Alabama Alimony Law confers an economic preference on women in order to reduce the disparity in economic condition between men and women caused by a long history of economic discrimination against women. The law does not penalize women and its structure and history reveal that it was enacted as compensatory legislation.

The Alabama Alimony Law should be declared constitutional, and the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I.

Appellee urges a highly selective reading of this Court's precedent to concoct the "rule" that a statute "economically preferring" men is unconstitutional, while a statute economically preferring women is inevitably constitutional. Further, appellee asserts that Alabama's

one-way alimony law is "compensatory," ergo inevitably constitutional. But the dominant theme of this Court's gender discrimination decisions in the 1970's escapes appellee's eye: Differential treatment of the sexes, whether on the surface favorable or unfavorable to females, is impermissible when rooted in "archaic and overbroad generalizations," or "the role-typing society has long imposed . . . such as casual assumptions that women are 'the weaker sex' or are more likely to be child-rearers or dependents." *Califano v. Webster*, 430 U.S. 313, 317 (1977), citing in support the analyses in *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

Beyond dispute, as appelle concedes (Brief of Appellee at 11-13), Alabama's alimony law in fact rests on the ancient common law's "archaic and overbroad generalizations," on "role-typing," and on the assumption that women are "more likely to be dependents." Thus, appellee asks this Court to eviscerate sound, carefully evolved doctrine, and to revert to "habit rather than analysis"[1] in characterizing centuries-old sex classification as "benign."

Plainly, neither this Court's decisions, nor Alabama law fit the Procrustean bed styled by appellee. In *Wiesenfeld* and *Goldfarb*, the plaintiff-victims of the statutory discrimination – those excluded from eligibility – were men. In both cases, this Court firmly rejected the Government's attempt to shield the laws in question by reciting a "compensatory purpose." The Court saw clearly what appellee here would obscure: That the wording of a statute excludes men rather than women is of no consequence. What matters is whether the statute, in purpose and effect, is genuinely compensatory, or is simply a product of, and reinforcement for, a habit of gender-stereotyped thinking.

[1] *Califano v. Goldfarb*, 430 U.S. 199, 222 (1977) (Stevens, J. concurring).

And Alabama's alimony law, in context of related Alabama laws stemming from the same source, is part of "crazy quilt,"[2] a pattern hardly designed with economic preference for women in mind. Indeed, appellee acknowledges that the statute in question is the product of a common law system that treated the wife as a "nonentity" (Brief of Appellee at 12).[3] The foundation on which Alabama law in this area rests is impossible to conceal -- it is the bald assumption of male dominance.[4]

[2] See Knowles, *The Legal Status of Women in Alabama: A Crazy Quilt*, 29 Ala. L. Rev. 427 (1978) (pointing out that Alabama laws purporting to protect or compensate the female – mainly alimony and inheritance laws – are limited to those affecting the propertied classes).

[3] For example, an Alabama statute of an age and genre similar to the alimony law and still in force prefers fathers to mothers in awarding damages for the wrongful death or injury of a child. Ala. Code §§6-5-390 to -391 (1975) (father alone may sue and recover unless he is dead, has deserted the family, is in prison, insane or mentally incompetent); see *Adkison v. Adkison*, 286 Ala. 306, 239 So.2d 562 (1970); *Thorne v. Odom*, 349 So.2d 1126 (Ala. 1977) (applying the law to exclude mother from any portion of the recovery although she was the sole custodian of the child).

[4] Note, however, the dawning recognition in Alabama that legislation "cannot rest upon an ancient myth that married women are presumed to be more needful of protection . . . than other adults, male or female." *Peddy v. Montgomery*, 345 So.2d 631, 637 (Ala. 1977) (holding inconsistent with the Alabama Constitution a state statute requiring a wife to obtain her husband's signature before she could sell her land).

II.

Argument indistinguishable from the one made by appellee was recently analyzed and rejected in a well-reasoned opinion by the Supreme Judicial Court of Maine, *Beal v. Beal,* decided June 23, 1978, 47 U.S.L.W. 2041-42 (full opinion annexed as an Appendix to this Reply Brief). Holding unconstitutional Maine's former statute which subjected husbands but not wives to alimony claims, the Maine Supreme Court said (citing *Reed* and *Frontiero*):

> [S]ex discrimination can no longer be justified by outdated sexual stereotypes concerning the respective roles of men and women. . . . Though it may be a fact that more women than men require alimony after divorce, courts are quite capable of determining needs on a case-by-case basis. Administrative convenience does not justify the perpetuation of sex discrimination.

CONCLUSION

For the reasons presented by appellant and by the American Civil Liberties Union as *amicus curiae,* the judgment below should be reversed, and Code of Alabama 1975 §§ 30-2-51 through 30-2-53 declared unconsitutional insofar as these provisions differentiate between individuals solely on the basis of gender.

Respectfully submitted,

JOHN L. CAPELL, III
CLINTON B. SMITH

APPENDIX

APPENDIX Exhibit A

Date Opinion Filed
June 23, 1978

Reporter of Decisions
Decision No. 1746
Law Docket No. Was-77-1

OSSIE BEAL

v.

INEZ BEAL

GODFREY, J.

In December, 1971, appellee Inez Beal was divorced from appellant Ossie Beal and was awarded alimony. In June, 1976, appellee brought a motion seeking to recover arrearages of alimony. Appellant defended on the ground that the alimony statute of Maine, as it stood in 1976, was unconstitutional under the Maine and federal constitutions because it denied males equal protection of the law. The Superior Court found for Inez, and Ossie appeals.

Appellant asserts that the Maine alimony statute then in effect discriminated against the class of divorced men by subjecting them to claims of alimony while not subjecting divorced women to similar claims.[1] In 1976, section 721 of title 19 of the Revised Statutes provided in terms for payment of alimony to divorced women. No other provision of Maine family relations law authorized imposition of alimony for the benefit of divorced men. The statutory scheme apparently discriminated against divorced men as a class.

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[1] The legislature has replaced the statute since this appeal was heard to make either spouse eligible for alimony. P.L. 1977, ch. 564, §86, effective July 23, 1977.

We must determine whether the discrimination denied appellant's class the equal protection of the laws within the meaning of the fourteenth amendment to the United States Constitution or section 6-A of article I of the Maine Constitution. We conclude that the discrimination had no rational relationship to any legitimate state objective and therefore denied appellant equal protection of the laws. *See Craig v. Boren*, 429 U.S. 190 (1976); *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, Me., 307 A.2d 1 (1973), *appeal dismissed*, 414 U.S. 1035. We need not decide whether sex is a suspect classification or whether a male can invoke any suspect nature of the classification to gain the benefits of strict scrutiny of the discrimination. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). The classification in this case does not pass the rational basis test.

The alimony statute challenged in this case was derived from the statutes of 1821, chapter 71, section 5. The early statutes provided for alimony for support of the wife if the divorce was granted because of the fault of the husband. *Chase v. Chase*, 55 Me. 21 (1867). At one time, a purpose of this alimony scheme may have been to protect a right of the innocent wife to support by her former husband. *See Bubar v. Plant*, 141 Md. 407, 44 A.2d 732 (1945). However, in *Strater v. Strater*, 159 Me. 508, 196 A.2d 94 (1963), this court recognized that the purpose of the alimony statute was to continue financial relations of the parties so that the wife could maintain her station in life. This court said:

> "The granting of alimony is within the sound discretion of the court determined by many factors, including the husband's ability to pay, the wife's station in life and her financial worth and income." 159 Me. at 517, 196 A.2d at 99.

Section 1 of chapter 399 of the Public Laws of 1971 eliminated the fault provision from the alimony statute, thereby leaving as the sole purpose of the statute the provision of financial support to the former wife when necessary.

The arrangement making former wives eligible for support but not former husbands in similar circumstances did not bear a rational relationship to legitimate state interests. *See Craig v. Boren*, 429 U.S. 190 (1976). Government interest in administrative convenience does not justify arbitrary legislative choices between the sexes. *Reed v. Reed*, 404 U.S. 71 (1971). Furthermore sex discrimination can no longer be justified by outdated sexual stereotypes concerning the respective roles of men and women. *Frontiero v. Richardson*, 411 U.S. 677 (1973). As Chief Justice Dufresne observed in his concurring opinion in *Pendexter v. Pendexter*, Me., 363 A.2d 743, 747 (1976), the years have brought great changes in economic relations among men and women. Those changes have received recognition by the United States Congress and the Maine Legislature in their approval of the proposed Equal Rights Amendment and in statutes prohibiting many forms of sex discrimination.[2] Though

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[2]The 92d Congress proposed the Equal Rights Amendment in its second session, on March 22, 1972. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). Congress has enacted many measures dealing with problems of sex discrimination. *E.g.*, 15 U.S.C. §1691 (equal credit opportunity) (Supp. V 1976); 20 U.S.C. §1866 (Women's Educational Equity Act of 1974) (Supp. V 1976); 29 U.S.C. §206(d) (equal pay) (1970); 42 U.S.C. §2000-c (public education) (Supp. V 1976); 42 U.S.C. ch. 21, subch. 6 (equal employment opportunity) (1970).

The Equal Rights Amendment was ratified by the Maine Legislature in 1974. 2 Laws of Maine 1975, 2324. The Maine Human Rights Act, 5 M.R.S.A. ch. 337 (Supp. 1973) and subsequent amendments (Supp. 1977-78) prohibit sex discrimination in many respects.

it may be a fact that more women than men require alimony after divorce, courts are quite capable of determining needs on a case-by-case basis. Administrative convenience does not justify the perpetuation of sex discrimination.

Nor do we believe that the discrimination in this case can be justified under the rationale of *Kahn v. Shevin*, 416 U.S. 351 (1974). In that case the Supreme Court upheld a tax exemption that favored widows but not widowers. The court followed the tradition of according great deference to the tax classification. Furthermore, the direct burden of the discriminatory exemption did not fall on any particular class whereas under the former Maine alimony statute the burden fell directly on the class of divorced men. We conclude that the sex-based distinction apparent in the alimony statute as it stood in 1976 was not justified by legitimate state interests.

We must therefore decide what relief should be given in the present case. As Mr. Justice Harlan pointed out in his concurring opinion in *Welsh v. United States*, 398 U.S. 333, 361 (1970):

> "Where a statute is defective because of under inclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."

In choosing between invalidation of a discriminatory statute or treating it as inclusive of an impermissibly excluded class, the court must ascertain and effectuate the predominant legislative purpose behind the statute. *See Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924). In several important cases the benefits of the statute have

been extended to the improperly excluded class. *E.g., Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *White v. Crook*, 251 F.Supp. 401 (M.D. Ala. 1966), the court, though holding unconstitutional a state statute excluding women from jury duty, did not strike down the statute but entered an order extending to women the right and duty of serving, subject only to a temporary stay to permit the legislature to take detailed corrective action consistent with the court's opinion.

Broadening of the scope of the former alimony statute would result in a burden on some members of the class of divorced women who might be required to pay alimony. If the issue were whether to extend burdens under a discriminatory penal statute, obvious negative factors would come into play. *See Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518-23 (1926). However, in civil cases comparable to the controversy before us, the courts have extended the burdens on private parties in the process of extending the benefits originally available to an unconstitutionally restricted class. In *Levy v. Louisiana*, 391 U.S. 68 (1968), the court did not have any problem in extending both the benefits and burdens of a Louisiana wrongful death statute which in terms permitted recovery for the benefit of legitimate children of the deceased. The Court held that illegitimate children must be permitted to recover under the statute. In *Harrigfeld v. District Court*, 95 Idaho 540, 511 P.2d 822 (1973), the Idaho Supreme Court carefully considered the problem of extending the scope of an improperly discriminatory statute where the burden would fall on private parties. Finding that the predominant legislative purpose would be served by extending the benefits to the class of improperly excluded persons, the court extended both the benefits and

the burdens of the statute. Thus, in cases of this sort, where an extension of the burden of a statute must be taken into account, we must still evaluate the dominant legislative intent and the importance of the statute and then determine whether in the light of that evaluation the benefits of the statute should be extended to the unincluded class or the statute treated as wholly invalid.

The Maine alimony statute has been in effect in some form for more than one hundred and fifty years, and it has never expressly excluded awards of alimony to divorced men. It merely did not authorize such awards before July 23, 1977. There are innumerable outstanding decrees awarding alimony, and those decrees are relied upon by the beneficiaries. Furthermore, those decrees serve the overriding legislative purpose, which is clearly to provide alimony in order to help preserve the economic status quo that existed during marriage. By its repeal and replacement of the alimony statute in 1977 the legislature has made it clear that as between abolishing alimony and making it available to husbands in appropriate cases, it would choose the latter. We conclude that the dominant legislative purpose of the alimony statute, as it stood when this action was brought, is correctly served by treating it as extending eligibility to men as well as women. This result is supported by well-reasoned commentary on this subject. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 912-20 (1971).

The entry is:

Appeal denied.

Judgment affirmed.

DUFRESNE, A.R.J., sat at oral argument as Chief Justice, but retired prior to the preparation of the opinion. He has joined the opinion as Active Retired Justice.

Pomeroy, Wernick, Archibald, Delahanty, JJ., Dufresne, A.R.J., concurring.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

—v.—

LILLIAN M. ORR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTION OF AMERICAN CIVIL LIBERTIES UNION

FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of approximately 200,000 members dedicated to de-

fending the rights of all persons to equal justice under the law. Recognizing that role-typing by sex is a pervasive problem in society, and affects women most harshly by confining their opportunities and chilling their aspirations, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

The ACLU has participated in most of the cases before this Court challenging sex-based discrimination under the fifth and fourteenth amendments. Lawyers associated with the ACLU presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later represented amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975) (heard in tandem with Taylor v. Louisiana, 419 U.S. 522 (1975)), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb 430 U.S. 199 (1977), petitioners in Struck v. Secretary of Defense, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants, appellees and amicus curiae in this Court in several other gender discrimination cases, including Craig v. Boren, 429 U.S. 190 (1976).

Amicus believes that the answer to the question presented in this case, whether the equal protection principle tolerates use of gender as a basis for allocating spousal support obligations, is of vital significance to the achievement of full equality of the sexes. While such laws do discriminate against men, they discriminate more insidiously against women by reinforcing attitudes and practices that put "women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). Needy spouses will retain full protection if the gender line now held by a dwindling minority of states is eradicated as an unfair and unsupportable means of regulating relations between individuals of equal dignity.

Because of the contribution the American Civil Liberties Union Women's Rights Project has made to the reasoned development of the law in this area, we believe our brief will be of substantial assistance to the Court in the resolution of the issues raised by this case.

We have sought consent to filing of this brief from appellant and appellee. Appellant has given consent in a letter filed herewith. Appellee has refused consent.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The interest of amicus appears from the foregoing motion.

Opinions Below

The opinion of the Supreme Court of Alabama is reported at 351 So.2d 906 (1977). The opinion of the Court of Civil Appeals of Alabama is reported at 351 So.2d 904 (1977). The Circuit Court of Lee County, Alabama, did not issue an opinion.

Jurisdiction

On November 10, 1977, the Supreme Court of Alabama entered an order that its Writ of Certiorari of May 24, 1977, to the Court of Civil Appeals be quashed as improvidently granted. It denied Appellant's petition for the writ, thereby making final the judgment of the Court of Civil Appeals. The lower court's judgment upheld the validity of the alimony provisions of the Code of Alabama in the face of Appellant's constitutional challenge. Rehearing in the Supreme Court of Alabama is not available since a motion for rehearing will not be received by that Court when the subject is an order denying certiorari. Alabama Rule of Appellate Procedure 39(j). Notice of Appeal to the Supreme Court of the United States was filed on January 30, 1977, and the Jurisdictional Statement was filed on February 8, 1978. On April 26, 1978, Appellee filed a Motion to

Affirm. Probable jurisdiction was noted on May 30, 1978. Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(2).

Constitutional And Statutory Provisions Involved

The United States Constitution, Amendment XIV, §1, provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Code of Alabama (1975), §§30-2-51 through 53* provides:

> §§30-2-51. If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order

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* Formerly Code of Alabama (1940), Title 34, §31-33. The Order of the Supreme Court of Alabama was entered after a recodification which enacted a few minor changes that have no bearing upon the issues presented herein.

to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family.

§30-2-52. If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

§30-2-53. If the divorce is in favor of the husband for the misconduct of the wife, and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

Question Presented

Whether §§30-2-51 through 53, Code of Alabama (1975), * by providing that only husbands, and not wives, may be required to pay alimony, denies the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution.

Statement Of The Case

In the Alabama court of first instance, the appellant's wife sought and was granted a judgment for alimony. This judgment was based on Tit. 34 §31, Code of Alabama (1940), ** which provides that, in appropriate circumstances, the judge, upon granting a divorce, "may decree to the wife an allowance out of the estate of the husband " (emphasis supplied). The court acknowledged that Alabama Supreme Court precedent pre-

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*/ Formerly Code of Alabama, Title 34, §31 (1940). The Order of the Supreme Court of Alabama was entered after recodification, which enacted a few minor changes that have no bearing upon the issues presented herein.

** This is now §30-2-51 of the 1975 Code. See preceding note.

cluded interpretation of the statute to permit a decree awarding alimony to a husband. Nonetheless, it rejected the husband's contention that the statute unconstitutionally discriminated on the basis of gender.

The rejection of this constitutional challenge was unanimously upheld by the Alabama Court of Civil Appeals. Orr v. Orr, 351 So.2d 904 (March 16, 1977, rehearing den. April 12, 1977). The Alabama Supreme Court, in a per curiam decision without opinion, quashed the writ of certiorari from this judgment as improvidently granted. 351 So.2d 906 (Nov. 10, 1977). Mr. Justice Almon, joined by Mr. Justice Bloodworth, wrote a brief concurring opinion, and Mr. Justice Jones, a detailed dissent.

The Alabama Court of Civil Appeals adopted "as [its] own" language and reasoning of the Georgia Supreme Court in Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. den., 421 U.S. 929 (1975), which, in turn, had found controlling this Court's decision in Kahn v. Shevin, 416 U.S. 351 (1974). The Georgia Supreme Court had ruled that "the ratio decidendi of Kahn is dispositive of the issues presented here" (206 S.E. 458, 459). The Alabama Court of Appeals followed suit, ruling that "the reasons [advanced in Kahn] are equally applicable in the instance of a wife involved in seeking alimony pursuant to a divorce" (351 So.2d at 905).

No attempt was made by the courts below to grapple with the glaring distinctions between Kahn and the case at hand. No attention was paid to, or even mention made of, any decisions of this Court subsequent to Kahn. Consequently, the Alabama Court of Civil Appeals failed to inquire whether the gender line drawn by the Alabama statute served to reinforce "the role-typing society has long imposed" upon both men and women (Stanton v. Stanton, 421 U.S. 7, 15 (1975)), whether that sharp line was the "byproduct of a traditional way of thinking about females" (Califano v. Goldfarb, 430 U.S. 199, 223 (1977)(Stevens, J. concurring)), whether it was rooted in the "archaic and overbroad" generalization that wives are dependent, husbands independent, gross characterizations "not . . . tolerated under the Constitution" (Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975)), whether assumptions underlying the statute about "the presumed role in the home" of women bore a substantial relationship to present reality (Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975)), or whether the Alabama "statutory structure and its legislative history revealed that the classification was . . . enacted as compensation for past discrimination" (Califano v. Webster, 430 U.S. 313, 317 (1977)).

Inexplicably, the Alabama Court of Civil Appeals made no attempt whatever to reconcile its decision with the holdings in

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), that the legislature, in granting social security benefits, could not discriminate against widowers by resorting to a gender criterion in lieu of a sex-neutral, functional classification. Nor did that court advert to the heightened review standard for line-drawing by sex articulated in Craig v. Boren, 429 U.S. 190 (1976). As far as the jurists both on the Alabama Court of Civil Appeals and on the Alabama Supreme Court (other than dissenting Mr. Justice Jones) were concerned, this Court's 1975-1977 gender discrimination decisions might never have been written.

As already indicated, the Supreme Court of Alabama disposed of this case per curiam without opinion. Mr. Justice Almon's very brief concurring opinion refers to no decision of this Court; disregarding the careful limitations marked by the Court in Califano v. Webster, 430 U.S. 313 (1977) (per curiam), and Craig v. Boren, 429 U.S. 190 (1976), Mr. Justice Almon's opinion broadly states "statutes which grant to women rights which men do not possess are not unconstitutional" (351 So.2d 906). Only Mr. Justice Jones, in his dissenting opinion, considered decisions and authorities subsequent to Kahn. Finding "the assumption that wives may depend upon their husbands for support, but husbands never depend on their wives . . . has no rational basis in

reality" (351 So.2d at 908) and that Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) "evinces a shift in the Court's approach to sex-discrimination cases" (351 So.2d at 908), he concluded that the Alabama alimony statute was unconstitutional.

Summary Of Argument

I.

The Alabama alimony statute unconstitutionally discriminates on the basis of gender. The sharp sex line it draws reinforces "the role-typing society has long imposed" upon men and women [i.e., husband at work, wife at home] (Stanton v. Stanton, 421 U.S. 7, 15 (1975)) and invidiously discriminates against spouses who do not conform to this type casting. The rigid gender classification at issue is the "byproduct of a traditional way of thinking about females" (Califano v. Goldfarb, 430 U.S. 199, 223 (1977)(Stevens, J. concurring)). Riveted to a "presumed role" for women that bears no substantial relationship to present reality (Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975)), the statute rests on "archaic and overbroad" generalizations about women and men "not . . . tolerated under the Constitution" (Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)).

II.

The equal protection clause safeguards not only women, but also men, against discrimination, for sex lines in the law generally cut with two edges. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The Alabama alimony statute unfairly and unconstitutionally discriminates against husbands who elect to stay at home and care for the family, or who, relying on their wives' ability and desire to make the major contribution to the financial support of the family, select a less remunerative career, or who, because of involuntary disability, are necessarily dependent on their wives. The unwarranted assumption inherent in the Alabama statute as to the wife's proper role in the family is increasingly removed from reality. Cf. Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975).

III.

Classification by gender, to be permissible, "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). The discrimination mandated by the Alabama alimony statute is not "substantially related" to achievement of an important

governmental objective. While "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] . . . an important governmental objective," (Califano v. Webster, 430 U.S. 313, 317 (1977)(per curiam), "compensatory" discrimination is justified only if (1) the history of the challenged provision reveals a genuine intention to remedy past discrimination against women; and (2) the challenged scheme actually operates "directly to compensate women for past economic discrimination," without denigrating the status of gainfully-employed women. See Califano v. Webster, supra, 430 U.S. at 317-318.

The Alabama alimony statute meets neither condition. There is no evidence whatever that the legislation, which has read the way it does for more than one hundred years, is anything other than "the accidental byproduct of a traditional way of thinking about females." Califano v. Goldfarb, 430 U.S. 199, 223 (1977)(Stevens, Jr., concurring). And the challenged scheme does not seek to compensate women for past economic discrimination; it simply helps to channel them into traditional roles. Moreover, to the extent the Alabama statute rewards women for relinquishing gainful employment to care for home and children, that purpose can be achieved no less effectively without discriminating against husbands.

IV.

The gender discrimination effected by the Alabama statute is not fairly and substantially related to the objective of protecting the parent who stays at home. The present reality is that the majority of wives with school-age children are gainfully employed outside the home. * Since the award of alimony is made by the court on a case-by-case, individualized basis, there can be no tenable reason for excluding husbands a priori. "[T]he administrative convenience in dealing with women as a class is insufficient justification" for resort to a sharp sex line (Taylor v. Louisiana, 419 U.S. 522, 535 (1975)), all the more so for a decision of the kind here at issue, where adjudication is not accomplished lump fashion, but turns on facts and circumstances peculiar to each case.

Since the gender line drawn by the Alabama alimony statute is unconstitutional, the case should be remanded to the Alabama Supreme Court for that tribunal's determination of the proper, sex-neutral application of the state's law. See Stanton v. Stanton,

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* As of March, 1975, 54.8% of mothers with children aged 6 to 17 were in the work force. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN WORKERS TODAY 4(1976).

421 U.S. 7, 17-18 (1975).

ARGUMENT

I.

THE ALABAMA ALIMONY STATUTE DISCRIMINATES ON THE BASIS OF GENDER IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The Alabama Alimony Statute Unfairly and Unconstitutionally Reinforces "Role-Typing."

Section 30-2-51 Code of Alabama, *authorizes an award of alimony "to the wife" out of the estate of "the husband." The Alabama Supreme Court has construed this provision as precluding an award of alimony to the husband. Davis v. Davis, 279 Ala. 643, 189 So.2d 158 (1966). This preclusion reinforces the "role-typing" of both husbands and wives that the Constitution forbids. Cf. Stanton v. Stanton, 421 U.S. 7, 15 (1975).

If the Alabama legislature sought fairly and equitably to compensate spouses who devoted themselves to home and children rather than building an outside career, resort to a gender criterion would be altogether inappropriate. Since an award of alimony is tailored, in any event, to the particular facts and circumstances of the individual case, the court could determine

* See note on p. 7, supra.

whether a spouse should be granted alimony without regard to gender. The need of one spouse, the resources of the other, would be principal guides. Rather than prescribing an unprejudiced, gender-neutral rule, however, the Alabama statute erects an absolute bar to alimony for a husband. It thereby leads both husband and wife to assume roles and pursue employment which neither might choose absent government steering.

Since the husband cannot look to his wife for alimony in case of divorce, he is impelled to assume a role and pursue a career that will assure him reasonable maintenance from other sources. Under Alabama's sex discriminatory scheme, a husband cannot afford to work as the family's principal homemaker if this should be his wish and his wife's preference. Nor can he afford to pursue any other primary activity that will not provide adequate maintenance in the event of divorce. Thus, for example, a husband who would like to be a poet or a painter and whose family can maintain an adequate living standard on his wife's earnings, is discouraged by the Alabama alimony statute from fully developing his talent and pursuing his aspiration. Such discrimination against him, solely because he happens to be a man, is wholly arbitrary.

Nor is the discrimination mandated by the Alabama statute felt only by the husband. Just as the scheme pushes the man into gainful employment, so it steers the woman into

the home. Someone will take care of the home and the children and, if it cannot be the husband, the wife is usually the only alternative. In short, Alabama's rule, affording security to some wives, but no husbands, against the loss of spousal income, imposes an official preference for a particular allocation of family responsibilities -- one under which the wife plays the dependent role. *

The Alabama statute thus limits a married couple's choice to divide responsibilities in the manner that best fits the

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* By 1976, only six states imposed no obligation on the wife or ex-wife for support of her husband or former husband: Alabama (Ala. Code, §30-2-51 through 53); Georgia (Ga. Code Ann. §30-202-206, 209, 213); Mississippi (Miss. Code Ann. §93-5-17, 23); South Carolina (S. Car. Code Ann. §20-112, 113); Tennessee (Tenn. Code Ann. §36-820); and Wyoming (Wyo. Stat. Ann. §20-36, 58, 63). At least since approval by the Commissioners on Uniform State Laws of the Uniform Marriage and Divorce Act (1971), the marked trend in the states has been toward wholly sex-neutral alimony statutes. For a model, see §308 of the Uniform Act.

pair's own talents, preferences and capacities. The law significantly influences both husbands and wives to conform to traditional notions about their respective roles. It is exactly this kind of line drawing -- legislation on the basis of "role-typing" (Stanton v. Stanton, 421 U.S. 7, 15 (1975)), "a traditional way of thinking about females" (Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)), "archaic and overbroad" generalizations (Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975), and "the presumed role in the home" of women (Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975)) -- that this Court, since Frontiero v. Richardson, 411 U.S. 677 (1973), consistently has condemned as inconsonant with the equal protection clause.

B. The Alabama Alimony Statute Unfairly and Unconstitutionally Discriminates Against Husbands.

While women have been the principal victims of gender discrimination, sexual stereotyping of men is also alien to the command of the equal protection clause. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Note, 89 Harv. L. Rev. 95 (1975). To assume that only wives will find themselves at divorce without independent means and without the skills and experience necessary for gainful employment, is to indulge in the sort of "archaic and overbroad" generalization (Schlesinger v.

Ballard, 419 U.S. 498, 508 (1975)), and "assumptions as to dependency" (Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975), this Court has declared intolerable under a meaningful equal protection standard. See Califano v. Goldfarb, 430 U.S. 199 (1977); Note, 91 Harv. L. Rev. 177 (1977). Moreover, the assumption that only women are destined to be financial losers when a marriage breaks down is increasingly removed from reality now that women are entering and remaining permanently in the paid labor force in dramatically large numbers. See especially Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975), noting that "in October, 1974, 54.2% of all women between 18 and 64 years were in the labor force" and that "51.2% of the mothers [of school age children] whose husbands were present in the household were in the work force." *

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* As of June 1977, 56.1% of all women between 20 and 64 were in the paid labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings Table A-3 (July 1977). By March, 1977, women constituted 41.1% of the total labor force. Hayghe, Marital and Family Characteristics of Workers, Tables 1 & 3, Monthly Labor Review, Bureau of Labor Statistics, U.S. Dep't of Labor (Feb. 1978).

Indeed, the assumption that only wives, never husbands need alimony is the prototypical "automatic reflex" based on "habit, rather than analysis or actual reflection" this Court has encountered and condemned in recent Terms. See Califano v. Goldfarb, 430 U.S. 199, 222 (1977)(Stevens, J. concurring).

The discrimination based on this assumption unfairly deprives of alimony all husbands who do elect to stay home and take care of the family and who, at divorce, find themselves in exactly the same situation as the wife who has accepted the homemaker role. This discrimination also unfairly deprives of alimony the husband who, relying upon his wife's ability and willingness to provide the family's principal financial support, selects a less remunerative career than he might otherwise choose. And, of course, this discrimination unfairly deprives of alimony the husband who, because of an involuntary disability, is necessarily dependent on his spouse, and who, if the situations were reversed, would be required to pay alimony to his wife.

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), this Court held unconstitutional, as based on unwarranted assumptions concerning the wife's role in the family, the denial to a surviving husband of Social Security benefits the statute accorded a similarly situated surviving wife. The reasons that determined

the Court's judgments in Wiesenfeld and Goldfarb apply with force here. It is unconstitutional for Alabama, on the basis of unwarranted assumptions as to the wife's role in the family, to withhold from a husband after termination of the marriage those benefits which the statute provides for a similarly situated wife.

C. By Discriminating on the Basis of Gender, the Alabama Alimony Statute Does Not Substantially Serve an Important Governmental Objective.

Classification by gender, although not yet declared by the majority of this Court inherently suspect (Stanton v. Stanton, 421 U.S. 7, 13 (1975)), is properly regarded under the Court's 1975-1977 holdings as prima facie unconstitutional. Gender lines in the law can escape condemnation only if they "serve important governmental objectives" and are "substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976); See Note, 91 Harv. L. Rev. 177 (1977). The burden of showing that these conditions are met is upon those urging the classification's propriety.

The Alabama Court of Civil Appeals reasoned that "it is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed." 351 So.2d at 905. This may be

true, but it is irrelevant to the equal protection issue raised here. Surely, there are many women who forego career development in order to raise a family and support their husbands' careers. At divorce, they find themselves without means and the skills for gainful employment. Beyond question, a state properly may provide a cushion for such women by authorizing an award of alimony. But to conclude from this that the state may therefore discriminate against those husbands who find themselves in exactly the same position goes far beyond rational classification in pursuit of a constitutionally permissible objective. It is indeed appropriate for a state to require a husband to provide for the needs of a dependent wife. But to meet the equality principle's measure, the state must also provide a remedy for a husband where circumstances warrant an alimony decree against the wife. The alimony applicant's need (not his or her sex), in view of the relative financial positions of the parties, is the relevant issue.

The sole rationale advanced by the Alabama courts to support this discrimination is Kahn v. Shevin, 416 U.S. 351 (1974), in which this Court upheld a real property tax exemption granted to the blind, the totally

disabled, and widows but not widowers. * But the Alabama courts not only overlooked the very significant distinctions between Kahn and the case at hand, they also took no account of the substantial inroads made upon Kahn by this Court's subsequent decisions in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977).

1. The distinction between Kahn and the case at hand.

First, and perhaps most significantly, the impracticality of case-by-case ruling was a prime factor in Kahn. The $15 tax break there at issue ** simply would not make

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* In the version effective from December 31, 1971, through the date of this Court's decision, the statute (Fla. Stat. § 196. 202) read:

> Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

** Property to the value of $500 was exempt from tax. At the tax rate applicable when this Court heard Kahn, the saving amounted to $15.

sense if administrators were called upon to render individual determinations of entitlement. By contrast, alimony is not awarded categorically. Determination whether there shall be an award and, if so, its amount, calls for a careful evaluation of the individual case before the court.

In Kahn, the state argued precisely that point. It urged that because "the financial impact of spousal loss" is generally much greater for women than for men, making the tax exemption available only to women was reasonable in light of the state's strong interest in avoiding the expense and burden of case-by-case adjudication. A gender-neutral rule would lead to the same results in most instances but the cost of administering such a rule would be prohibitive.

Here, no such argument is possible. The award of alimony under Alabama law is discretionary with the court and it is only for wives who establish need. Thus, it cannot be argued that Alabama, like Florida in Kahn, is simply using female gender as a substitute for the determination of need or for dependency adjudications. Moreover, because the parties to a divorce are already before the court, and may actively litigate their relative financial resources and needs, scant additional administrative expense would be entailed were a husband permitted to assert an alimony claim. Moreover, any additional expense would not, as in Kahn,

be disproportionate to the benefit at stake. Nor would the expense deplete a limited state budget available for aiding the needy. Accordingly, the gender classification could not possibly be rationalized on the basis of administrative convenience, or as a means to spare the public purse. Cf. Califano v. Goldfarb, 430 U.S. 199, 235 (1977)(Rehnquist, J. dissenting); Frontiero v. Richardson, 411 U.S. 677, 688-690 (1973) (firmly rejecting the administrative convenience argument). In sum, in the present case, unlike Kahn, "the administrative convenience in dealing with women as a class is insufficient justification" for discriminating against men. Taylor v. Louisiana, 419 U.S. 522, 535 (1975). Women are not given alimony as a class, but only on a case-by-case basis; equal treatment for similarly situated men would occasion no disproportionate expense or inconvenience.

Second, while Kahn upheld a statute granting a tax benefit to the widow, that benefit did not perceptibly type-cast women as subordinate to men. Far more clearly, the discrimination visited upon the husband by the Alabama alimony statute stamps women as persons assigned a special place in a world controlled by men. By steering the husband out of the home, it steers the wife into it and keeps her there, thus discouraging wives from achieving economic self-sufficiency. As Mr. Justice Brennan so aptly expressed it, this insidious form of discrim-

ination, "in practical effect," puts "women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973).*

Third, the small tax break at issue in Kahn could not affect the husband's and wife's freedom to assume the roles and careers they found most suitable. The prospect of an annual $15 tax saving for real-property owners upon the death of a spouse could have no bearing whatever on a couple's decisions as to division of responsibilities between husband and wife. In contrast, the discriminatory statute challenged here, by attempting to allocate spousal support obligations, directly intrudes into this intimate area of family choice in such a way as to reinforce traditional gender roles.

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* Feminist advocates have repeatedly pointed out that laws using sex as a basis for allocating spousal support or alimony obligations, although they do discriminate against men, discriminate much more harshly against women, a point that should be clear to anyone willing to scratch beneath the surface. See, e.g., BROWN, FREEDMAN, KATZ & PRICE, WOMEN'S RIGHTS AND THE LAW 129 (Praeger 1977).

Fourth, in Kahn, real property tax legislation was at issue. In wielding the taxing power, legislatures traditionally have been left great leeway. Kahn v. Shevin, 416 U.S. 351, 355, 356 (1974).* In the present case, however, the question is not whether the state may give categorical tax benefits to the wife it does not give to the husband, but whether needy wives and husbands are to stand on the same footing vis-à-vis well-endowed spouses. The sex discriminatory scheme at issue here directly affects the inter sese relationship between the spouses. To this extent, the Alabama statute entails discrimination even more reprehensible than that invalidated in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977).

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* See generally Bitker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L.J. 51 (1972). Had Mel Kahn succeeded, what response to other property owners excluded from the exemption, the deaf, for example, or the never married or divorced woman? But cf. Cummings v. Board of Education, 175 U.S. 528, 545 (1899)("[A]ll admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class because of their race . . . .").

Kahn, therefore, far from controlling the instant case, is wholly inapposite to it.

2. Weinberger v. Wiesenfeld and Califano v. Goldfarb, rather than Kahn, are the pertinent analogues.

This Court's decisions in cases subsequent to Kahn demonstrate unequivocally that the courts below read that decision far too expansively. For the position that "statutes which grant to women rights which men do not possess are not unconstitutional," 351 So.2d at 906 (Almon, J. concurring), collides head-on with the Court's judgments in Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Indeed, even when laws discriminating against men are purportedly intended to remedy past discrimination against women, their real purposes and actual effects have been carefully scrutinized by this Court. Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Schlesinger v. Ballard, 419 U.S. 198 (1975). As shown above, the discrimination upheld in Kahn did not channel a woman's decisions and occupations and, as subsequent decisions have emphasized, was perceived by this Court as having a remedial purpose. Craig v. Boren, 429 U.S. 190, 198 n. 6 (1976); Califano v. Goldfarb, 430 U.S. 199, 209 n. 8 (1977). As shown below, the Alabama alimony statute cannot

candidly be characterized as a remedy for the role-typing and limited opportunity-structure women have long endured.

Kahn, if it has survived subsequent decisions of this Court to any extent, has surely been confined to the narrow issue there presented. That issue, as demonstrated above, was wholly different from the one raised by the case at hand. The statute in the present case discriminates arbitrarily and unnecessarily on the basis of unwarranted assumptions as to the husband's and wife's role in the family. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), by holding that the Social Security Act may not, on the basis of such assumptions, withhold benefits from the widower that it grants to the widow, are therefore the pertinent analogues.

D. The Alabama Alimony Statute is Not Supportable as "Compensatory" Legislation.

"Reductions of the disparity in economic conditions between men and women caused by the long history of discrimination against women [is] . . . an important governmental objective." Califano v. Webster, 430 U.S. 313, 317 (1977). But a genuine claim that a statute pursues this objective is possible only if (1) the statutory structure and

legislative history reveal that the classification was in fact enacted to compensate for past discrimination, and (2) the classification does not in fact penalize women. This Court has squarely so ruled in Califano v. Webster, 430 U.S. 313, 316-317 (1977) (per curiam):

> To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective. Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). But "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975). Accordingly, we have rejected attempts to justify gender classifications as compensation for past discrimination against women when the classifications in fact penalized women wage earners, Califano v. Goldfarb, 430 U.S. at 209 n.8;

> Weinberger v. Wiesenfeld, supra, at 645, or when the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination. Califano v. Goldfarb, ante, at 212-216 (plurality opinion), 221-222 (Stevens, J., concurring in the judgment); Weinberger v. Wiesenfeld, supra, at 648.

The Alabama alimony statute utterly fails to meet the Webster standards.

1. The Alabama alimony statute does not seek to redress past discrimination against women.

The discrimination against husbands has been part of the Alabama statute for more than a hundred years. See Ala. Code § 1971 (1854). At no time have the Alabama legislature or courts sought to justify it as designed to redress discrimination practiced against women. On the contrary, the statute's long history and the prevalent view of women at the time of its enactment * make it apparent that the sex line drawn rests on "an attitude of 'romantic paternalism'" (Frontiero v. Richardson, 411 U.S. at 684), "archaic and

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* See generally Johnston, Jr., Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality, 47 N.Y.U.L. Rev. 1033 (1972).

overbroad generalizations" about women (Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)), and "casual assumptions that women are 'the weaker sex' . . . more likely to be . . . dependents" (Califano v. Webster, 430 U.S. 313, 317 (1977)). Indeed, the Alabama courts have explained the statutory discrimination not as a remedy for past stereotyping of women, but as a corollary of the common-law obligation of husbands to support their wives. Davis v. Davis, 279 Ala. 643, 644, 189 So.2d 158,160 (1966); Sims v. Sims, 253 Ala. 307, 316, 45 So.2d 25, 29 (1950); See also Orr v. Orr, 351 So. 2d 906, 908 (1977)(Jones, D. dissenting). This Court has left no doubt that a freshly manufactured "compensatory" rationale cannot serve to cloak the fact that legislation has been based on archaic assumptions; it has declared in no uncertain terms that such assumptions"do not suffice to justify a gender-based discrimination . . . ." Califano v. Goldfarb, 430 U.S. 199, 217 (1977).

2. The Alabama alimony statute penalizes women.

Not only does the Alabama alimony statute fail to redress society's long history of discrimination against women, it is designed to perpetuate that tradition. The statute effectively announces the state's preference for an allocation of family responsibilities under which the wife plays a dependent role. See I.A., supra. Accordingly, the Alabama

alimony statute is also impossible to justify under the second condition ruled essential in Webster.

II.

THE CASE SHOULD BE REMANDED TO THE ALABAMA COURTS FOR DETERMINATION OF THE PROPER, SEX-NEUTRAL APPLICATION OF THE STATE'S LAW.

The appellant's reliance on the unconstitutionality of the Alabama alimony statute is indirect. He is not seeking alimony from his wife. Rather, he is seeking to escape his obligation to pay alimony to her. Although it may be questioned whether a husband in this position can properly raise the constitutional objection, the answer must be in the affirmative. If this Court declares the Alabama statute unconstitutional, and the Alabama courts rule the constitutional defect invalidates the whole statute, there would be no legal basis for requiring a husband to pay alimony. Accordingly, appellant undoubtedly has standing to raise the constitutional issue.

Whether the Alabama statute is constitutional presents a question for ultimate decision by this Court. But the impact on Alabama law of a holding that the gender line is unconstitutional is properly left for resolution by the Alabama courts.

There is no constitutional right to alimony for either sex. The only constitutional requirement is that state law treat both sexes equally. Cf. Stanton v. Stanton, supra, 421 U.S. at 17-18; Craig v. Boren, supra, 429 U.S. at 210 n. 24. Thus, Alabama remains free to disallow alimony or to authorize its award to needy spouses of either sex. Cf. Stanton v. Stanton (II), 429 U.S. 501 (1977), on remand, 564 P.2d 303, rehearing den., 567 P.2d 625 (Utah 1977).

On remand, we would seek to appear amicus curiae before the state courts to urge that, in light of the unconstitutionality of a construction of the alimony statute that denies awards to men, the law be construed to permit awards on a sex-neutral basis. It is true that previous decisions have held the Alabama statute a barrier to such awards. See, e.g., Davis v. Davis, supra. These decisions, however, never took account of the argument that the statute as so construed was unconstitutional. Therefore, the Alabama courts have not yet had an opportunity to adopt a construction that avoids the constitutional difficulty. Nor was that possibility considered by the courts below in this case.*

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* The Court of Civil Appeals considered only whether the statute, as previously construed by the Alabama Supreme Court, violated the equal protection clause. The Alabama Supreme Court disposed of the case summarily by quashing its writ of certiorari as improvidently granted. 351 So.2d 906.

This Court has not hesitated, in dealing with federal statutes extending benefits without sufficient justification to one sex but not to the other, to declare the statute unconstitutional, not in its entirety, but only insofar as it denied benefits to the disfavored sex, and to enter judgments awarding the disputed benefits to claimants apparently barred by the statute. See, e.g., Weinberger v. Wiesenfeld, supra. If the Alabama courts were to adopt the same approach, there would be no constitutional obstacle to requiring the husband to pay alimony in this case. As the Court observed in Stanton, supra, 421 U.S. at 18, "[t]he appellant, although prevailing . . . on the federal constitutional issue," may not ultimately prevail in this lawsuit.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed, §§30-2-51 through 53, Code of Alabama (1975) should be declared unconstitutional insofar as it denies alimony to husbands, and the case should be remanded to permit the Alabama courts to determine the effect of this ruling on Alabama law as applied to this case.

Respectfully submitted,

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* Amicus gratefully acknowledges the assistance provided in the preparation of this brief by Diana T. Tanaka, third year law student at Harvard Law School.